No. 89-850

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROBERT G. CRONSON, AUDITOR GENERAL OF THE STATE OF ILLINOIS,

Petitioner,

vs.

CHICAGO BAR ASSOCIATION, ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS, and STATE BOARD OF LAW EXAMINERS OF THE SUPREME COURT OF ILLINOIS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

Of Counsel:

E. BARRETT PRETTYMAN, JR.
HOGAN & HARTSON
Columbia Square
Suite 1300 West
555 13th Street, N.W.
Washington, D.C. 20004
(202) 637-5600

LEGRAND L. MALANY
600 South Rosehill
Springfield, Illinois 62704
(217) 525-1132

SAMUEL W. WITWER, SR.
SAMUEL W. WITWER, JR.
Counsel of Record
WITWER, BURLAGE, POLTROCK & GIAMPIETRO
125 South Wacker Drive
Suite 2700
Chicago, Illinois 60606
(312) 332-6000

Attorneys for Petitioner

Special Assistant Attorneys General
of the State of Illinois

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED FOR REVIEW

The Illinois Constitution and its implementing Auditing Act mandate the Auditor General, a constitutional officer, to conduct financial audits of all public funds of all agencies of the State. Since 1977, the Illinois Supreme Court has refused to permit such audits of two of its administrative agencies. Those agencies litigated as plaintiffs against the Auditor General, and the Illinois Supreme Court disposed of the case adversely to him. The questions presented are federal ones:

1. Did a majority of the Illinois Supreme Court publicly pre-judge the underlying case against the Auditor General, and by using its agencies as litigating arms, thereby violate the right of the Auditor General and those he represents to a fair hearing under the Due Process Clause of the Fourteenth Amendment?

2. Did the Illinois Supreme Court, as real party in interest, by declining the Auditor General's request for recusal and substitution of a majority of four of its justices and then ruling against him on his request for review of the intermediate appellate court's decision in its own favor, thereby act as a judge of its own cause in violation of the Due Process Clause?

3. Does due process require, where state measures are available for temporarily appointing substitute judges *pro hac vice*, that such measures be taken in order to provide a disinterested tribunal to rule on a party's petition for review?

PARTIES TO THE PROCEEDINGS BELOW

The case as captioned above names all formally designated parties in the underlying case. While not formally named as parties, four of the Illinois Supreme Court's seven justices were recipients of the Auditor General's Verified Motion For Recusal and separately responded with their own orders denying the same: Chief Justice Thomas J. Moran, and Associate Justices Daniel P. Ward, Howard C. Ryan and William G. Clark.[1]

The Auditor General, defendant below, although sued as a public official, sought in his representational capacity to assert the rights of Illinois citizens to the safeguarding of their public funds. In addition, he showed that in his private capacity he is a registered, non-practicing attorney personally affected by the outcome of the audit dispute.

---

[1] These four members presently constitute a quorum and majority of the court as they have since 1977 when the court issued the first of a series of public statements disclosing its legal position and wishes regarding its dispute with the State Auditor over his authority to audit certain court-controlled funds and to have access to certain court-controlled financial records.

Other court members not known or believed by the Auditor General to have announced such a predisposition and hence not recipients of recusal motions are Associate Justices Ben Miller, Horace L. Calvo, and John J. Stamos. Justice Stamos appears to have taken no position on the order below denying the Auditor General's request for recusal of four of the justices, nor does it appear that he joined the other named justices, who voted to deny such request, in invoking the Rule of Necessity.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Statutes

Other Authorities

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROBERT G. CRONSON, AUDITOR GENERAL OF THE STATE OF ILLINOIS,

Petitioner,

vs.

CHICAGO BAR ASSOCIATION, ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS, and STATE BOARD OF LAW EXAMINERS OF THE SUPREME COURT OF ILLINOIS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

Petitioner Robert G. Cronson (hereinafter called "the Auditor General" or "Cronson") prays that a writ of certiorari issue to review two final orders of the Illinois Supreme Court entered on July 27, 1989.

OPINIONS AND ORDERS BELOW

(a) The opinion and order of the Illinois Supreme Court filed July 27, 1989, is unreported and is reprinted in the Appendix hereto ("App.") at 1. The opinion and order re-

printed there is that of Justice Ward; identical counterpart orders and concurrences (App. 3) were filed by five other justices of the court on the same date. These orders denied the Auditor General's Verified Motion to Recuse four of the justices and to appoint substitutes, *pro hac vice*.

(b) The order of the Illinois Supreme Court in the underlying case (without opinion), also filed July 27, 1989, is unreported and is reprinted at App. 4. That order denied the Auditor General's Petition for Leave to Appeal from the majority panel decision of the intermediate Appellate Court of Illinois, First District, Fourth Division.

Petitioner timely filed on August 17, 1989 his Petition for Rehearing of the Order of July 27, 1989 denying his Verified Motion to Recuse and Appoint Substitute Justices; he also timely filed on August 17, 1989, a Motion for Leave to Petition for Rehearing of the order of July 27, 1989 denying the Petition for Leave to Appeal. The court below denied both applications for rehearings by order entered August 29, 1989. App. 5.

The opinions of the appellate court panel (majority and dissenting) filed May 18, 1989 are reported at 183 Ill.App. 3d 710, 539 N.E.2d 327 (1st Dist. 1989) and are reprinted at App. 6, 27.

JURISDICTION

This Court has jurisdiction to review the two aforementioned judgment orders of the Illinois Supreme Court by writ of certiorari pursuant to 28 U.S.C., § 1257 (3). On application of the Auditor General, Justice Stevens on September 20, 1989 entered an order extending to November 27, 1989 the time for filing this petition.

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

The Illinois Auditor General ("The Auditor General" or "Cronson") is charged by the Illinois Constitution with the responsibility to conduct public audits of the funds of all agencies of the State, executive, legislative and judicial.[2]

Since 1977, however, the Illinois Supreme Court has refused to permit the public audit of fees collected pursuant to its Rules in connection with the testing, licensing

---

[2] Article VIII, the Finance Article of the Illinois Constitution, provides in pertinent part:

> Sec. 3(a) The General Assembly shall provide by law for the audit of the obligation, receipt and use of public funds of the State. The General Assembly, by a vote of three-fifths of the members elected to each house, shall appoint an Auditor General and may remove him for cause by a similar vote . . . .
>
> (b) The Auditor General shall conduct the audit of public funds of the State . . . .

Additionally, the State Auditing Act recognizes Cronson's status as a constitutional officer charged with comprehensive duties to audit all state agencies and, thereby, to protect the public's "right to know". App. 35-37. Further, the Act vests in him broad authority to litigate to enforce the Constitution and Act so as to vindicate these public rights. App. 37.

and disciplining of Illinois attorneys. Such fees are paid by lawyers to the court's two administrative agencies, the Attorney Registration and Disciplinary Commission of the Illinois Supreme Court ("ARDC") and the State Board of Law Examiners of the Illinois Supreme Court ("BLE"). The fees are mandated by the Rules as a condition of admission to the Bar and subsequent practice of law in Illinois.[3]

The controversy began when the court instructed its two agencies not to cooperate with efforts by the Auditor General to conduct a public financial audit of their books and records.[4] This policy has remained unchanged since 1977.

The court also announced, but not in a judicial proceeding, that the auditing provisions of Article VIII, Section 3 of the Illinois Constitution and the implementing Auditing Act do not apply to the funds of its two agencies. It explained that ARDC and BLE were exempt[5] because they were not "state agencies" handling "public funds" (the two triggering conditions for public audit under the

---

[3] Although the license fees are held in separate accounts by ARDC, such revenues have been held to be "in no sense its own, but rather the Court's." *ARDC v. Harris, Cronson, et al.*, 595 F.Supp. 107, 112 (N.D. Ill. 1984). Likewise, ARDC is not autonomous but, rather, a mere functionary of the court. *Id.*

[4] See *Madden v. Cronson*, 114 Ill.2d 504, 501 N.E.2d 1267, 1270 (1986), *cert. denied*, 484 U.S. 818 (1987) (". . . the court directed [BLE and ARDC] . . . to refuse [Cronson's audit] demand . . ."). *See also* Responses of ARDC and BLE to Supp. Interrogatory No. 1 for Admissions.

[5] The exclusion from public audit which the court insisted be accorded its ARDC and BLE left them the only governmental units in Illinois—legislative, executive or judicial—to be placed outside the Auditor's purview. It likewise resulted in the legal profession being the only regulated occupation, out of a group of over 60, whose license fees escaped public audit. Def. Ex. 44, Cronson Testimony, Vol. VI, April 24, 1987, Tr. 76-77.

State's Constitution and Auditing Act). Def's *Excluded* Ex. Tab 7.

By letter dated February 28, 1977, the then Chief Justice Ward confirmed that there would be no such audit of ARDC and BLE, stating:

> The Court has examined this question and has asked me to advise that the funds of the Board and the Commission have not been considered to be public funds. [Def. *Excluded* Ex. Tab 2.]

Cronson vigorously protested the court's position, contending that his constitutional mandate to protect the public's right to proper stewardship of its monies required that he audit all public funds of all state agencies, including ARDC and BLE, without distinction or preference. The Auditor General also persisted in his efforts to obtain the audit, fearing that yielding to the court-requested exemption would invite attempts by other state units to avoid annual audits of billions of dollars of unappropriated but nevertheless public funds. The court rejoined in a series of extra-judicial public statements, reiterating its "opinion" and "decision" that such fees are not public funds of state agencies as a matter of law. It also argued that "Separation of Powers" principles precluded such an audit.

Most of these statements were made in the course of public hearings of the Legislative Audit Commission ("LAC"), a permanent Illinois legislative commission vested with responsibility to examine the Auditor General's performance of his auditing duties. That body had sought an explanation for the court's refusal to permit the financial audits in question.

Speaking for the court at a September 28, 1977 meeting of LAC, the then Court Administrator, Gulley, stated the court's view that ARDC and BLE funds are beyond the

reach of the constitutional and statutory public audit requirements. He testified:

> Under Article VI, Section 1, the judicial power is vested in the courts. It is the position of the Supreme Court that the judicial branch of the State government cannot be subordinated to the control of either of the other branches *and that other provisions of the Constitution or Statutes must be read with this important basic principle in mind.* [Def. *Excluded* Ex. Tab 7, at 17; emphasis added.]

The Court Administrator added:

> [The Auditor General] is mistaken if he thinks he has the duty or authority to make a compliance audit on the accounts of . . . [ARDC and BLE]. These are not administrative units of government in the same sense that my office is an administrative agency in the judicial branch of state government." [*Id.* at 25.]

The parties remained unable to agree, leading to further public dialogue. On January 10, 1978, the then Chief Justice Ward appeared before the LAC and stated:

> The Supreme Court funds and the funds received by the judiciary from the legislature [appropriated funds], that is public funds, are completely audited each year . . . . That is not a question before this Commission. We are dealing here with a question of the separation of powers of government. [LAC hearing minutes, Jan. 10, 1979, at 1; Def. *Excluded* Ex. Tab 9.]
>
> * * *
>
> The Constitution provides that the Auditor General shall examine the public funds and we felt that if he did so [as to ARDC], he would be vulnerable to a charge of exceeding his authority. [*Id.* at minutes 2.]

Once again, on November 28, 1979, the court conveyed its views to LAC. The minutes state:

> Representative Keane requested clarification of the finding which stated that the auditors had been informed by the Court that the Commission's funds are

> *not public funds.* Justice Goldenhersh said that this represented *the considered opinion of the Court but that there had been no formal legal proceeding in which that determination was made.* [LAC hearing minutes, Nov. 28, 1979 at 13; Def. *Excluded* Ex. Tab 10; emphasis added.]
>
> * * *
>
> Justice Goldenhersh explained the rationale behind the Court's opinion. *He said that the Court takes the position that these funds are not public funds. If they were, they would be placed in the State Treasury and subject to appropriation control.* The Court does not believe these funds were intended for the purpose or belong in that category. He said it is a matter of constitutional principle. *It seems though that if the funds were public funds, there would be an encroachment upon the constitutional powers of the Court. . . .* [*Id.*; emphasis added.]

The court's *a priori* position on the public audit issues was also disseminated to Illinois attorneys and jurists in a legal journal article written by the Court Administrator, speaking for the court. R. Gulley, "Why the Illinois Attorney Registration and Disciplinary Commission Should Not Be Audited," 63 Chi.B.Rec. 78 (1981).

Finally, in lieu of any constitutional public audits by the Auditor General, the court and its agents contracted with private auditors to review the books of ARDC and BLE under scope limitations prescribed by them.

In 1982, the Attorney General of Illinois issued an official opinion that the audit of ARDC and BLE funds sought by Cronson was indeed his constitutional duty, since ARDC and BLE were clearly "state agencies" administering "public funds". Ill. Att'y. Gen. Op. No. 82-022, Aug. 20, 1982. The Attorney General also found no "Separation of Powers" problem in having Cronson carry out his constitutionally-prescribed audit function with respect to all three branches of government. *Id.*

Within a week of the issuance of the Attorney General's opinion, the instant declaratory judgment and injunction suit was filed against the Auditor General in the Circuit Court of Cook County by the Chicago Bar Association ("CBA"), acting through counsel who would later represent the Supreme Court in related audit cases against Cronson, and ARDC and BLE, which, as noted above, were and are controlled agencies of the Supreme Court.[6] CBA and the court's agencies took legal positions against the Auditor General in the trial court identical to the views previously announced by the Supreme Court in 1977 and thereafter.

The trial court case consumed a period of several years. A lengthy hiatus occurred when Cronson sought discovery against the court's agencies with regard to factual questions bearing on the "state agency" and "public funds" issues while the court's arms vigorously opposed the same, filing a motion to prevent all discovery by Cronson. Several months later, the presiding judge denied ARDC's and BLE's Motion to Stay Discovery. However, another delay ensued as plaintiffs resisted specific discovery responses. Finally, by order filed December 15, 1985, the trial judge directed the court's agencies to respond to certain of Cronson's specific discovery demands.

Six weeks later, as the case appeared to be nearing a decision, the Illinois Supreme Court relieved presiding Judge Murray of his trial calendar and placed him on a temporary six-month assignment to the Appellate Court. Cronson then moved the Chief Justice to exercise his administrative authority to permit Judge Murray to com-

---

[6] Despite their legal positions on the audit controversy per the instructions of the Supreme Court, ARDC and BLE inexplicably were attempted to be named, and initially appeared, as co-defendants with Cronson. This incongruity was noted by the trial court, which *sua sponte* ordered ARDC and BLE to be realigned as parties plaintiff in accordance with their true interests. Order of May 4, 1984, Murray, J.

plete his service as presiding judge in this single case, without prejudice to his temporary assignment or, alternatively, to permit him to oversee compliance with the discovery production he had ordered. That relief was denied by the court on February 16, 1986. The trial calendar was next assigned to a newly designated presiding judge.

Upon a hearing on the pending summary judgment motions before the new judge, the Auditor General offered in evidence numerous exhibits relating to the Supreme Court's extra-judicial statements about the case, its relationship to its litigating agencies, its control of funds, and other pertinent material supporting his contention that the court's agencies were auditable. He also sought to show that the Supreme Court was the real party in interest, acting through its agencies, thus posing serious questions regarding Cronson's federal due process rights. The judge excluded substantially all of the exhibits.[7]

Finally, counsel for CBA, including counsel for the Illinois Supreme Court in a related case against Cronson,[8] stated in a memorandum:

> CBA submits that the foregoing [the argument against public audit] also has been the consistent opinion of the Illinois Supreme Court and its members. That has been apparent from various statements and writings of the Justices and Court Administrators referred to in CBA's previous Memoranda

---

[7] Only seven of 53 such exhibits offered by Cronson were received in evidence. The effect of such exclusions was substantially to adopt the anti-discovery contentions of ARDC and BLE and to put the case back on its pre-discovery footing.

[8] CBA's co-counsel, in seeking authority to act as a special counsel to the State of Illinois in a related audit case against Cronson, acknowledged that he was "representing the Supreme Court of Illinois in filing a mandamus . . . ." App. 41-42. In addition, ARDC's lead counsel below was, at all relevant times, the Deputy Administrator of ARDC, and thus, in substance, an employee serving at the pleasure of the court.

> filed in this case. This court should give due deference to those opinions and follow the same. [App. 39.]

By order filed April 21, 1987, the successor judge issued his summary judgment ruling adopting in full the Supreme Court's predeterminations and its view of the case, and denying the Auditor General's authority to conduct audits of ARDC and BLE. App. 43.

In the midst of the lengthy trial court proceeding described above, and before the summary judgment was issued, the Supreme Court caused a second action (not directly the subject of this certiorari petition) to be brought before itself against the Auditor General to force him to conduct a partial audit limited to those portions of the court's books which did *not* pertain to ARDC and BLE. This case, known as the "*Madden*"[9] suit, took the form of an original mandamus to be heard directly before the State Supreme Court, and was filed on March 21, 1986 against Cronson by Madden, the court's own employee and acting Administrator.

Madden's petition to his employer, the court, for permission to proceed in mandamus against Cronson was granted with extraordinary speed, only 24 hours after it was filed. It ultimately resulted in a mandamus order against Cronson to conduct the partial audits the Supreme Court desired. It also resulted in a published opinion containing commentary to the effect that the court had already resolved the "public funds" issue of the instant case, although it was still pending in the trial court. 501 N.E.2d at 1270; CBA Reply Brief, App. 39 at n. 1.

Cronson's response to his summons in the newly initiated *Madden* mandamus action was to file a special ap-

---

[9] *Madden v. Cronson*, 114 Ill.2d 504, 501 N.E.2d 1267 (1986), *cert. denied*, 484 U.S. 818 (1987).

pearance and objection on due process grounds, asserting that the court was in fact trying its own case against him. He also filed on June 6, 1986 a separate federal action under 42 U.S.C. § 1983, attempting to enjoin the hearing in *Madden* and thereby to preserve his federal due process rights. This action was unsuccessful. *Cronson v. Clark*, 645 F.Supp. 793 (C.D. Ill.), *app. dismissed*, 810 F.2d 662 (7th Cir. 1986), *cert. denied*, 484 U.S. 871 (1987).[10]

While the trial court proceeding in the instant case was still pending, the State Supreme Court requested Cronson and his attorney to appear for a hearing in *Madden*. In a letter to the clerk, Cronson's counsel respectfully declined. He took this step to avoid any contention that he was appearing generally and thus waiving his federal due

---

[10] Contrary to the suggestion contained in the Seventh Circuit's decision, there is no question in this case of Cronson's standing to litigate. The law is well settled that state officers with a duty to enforce state enactments have an adequate stake in controversies regarding such enactments to litigate in this Court, even if they cannot demonstrate "private damage". See *Coleman v. Miller*, 307 U.S. 433, 445 (1939). Moreover, Cronson's obligation under the Illinois Constitution requires him to vindicate the rights of all Illinois taxpayers to be assured of adequate oversight of Illinois public funds; as their representative, Cronson has *jus tertii* standing to litigate where, as here, there is a nexus between the status of taxpayers *qua* taxpayers and the enforcement of Art. VIII, § 3 of the Illinois Constitution, which imposes explicit conditions upon the use of public moneys. See *Flast v. Cohen*, 392 U.S. 83, 106 (1968). *Cf. Craig v. Boren*, 429 U.S. 190, 191-197 (1976) (constitutional *jus tertii* standing upheld in case brought under Fourteenth Amendment).

Finally, it must be remembered that Cronson did not initiate this case but was hailed into court as a party defendant when sued by the Illinois Supreme Court's surrogates. He therefore has a sufficient "personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions. . . ." *Baker v. Carr*, 369 U.S. 186, 204 (1962).

process objections, a question which would have been for the Illinois court itself to decide.[11]

The *Madden* case opinion, ordering Cronson to proceed with the partial audit desired by the Supreme Court, was accompanied by a special concurring opinion of Justice Simon (now retired and no longer serving on the Court), which spoke to the issue of fairness:

> I concur specially because I believe *too little attention has been given to the appearance of impropriety which arises from our participation in this case.*
>
> * * *
>
> The more difficult point is whether the court is in fact sitting in judgment of its own case. . . . But we cannot and should not gloss over the realities of the situation. Mr. Madden as Acting Director is an employee of the court, and he serves at our pleasure. We cannot but acknowledge that this action could only be maintained with our approval. . . .
>
> * * *
>
> Although the audit will not inure to our benefit—either financially or otherwise—apart from the interest we all have as citizens in a proper accounting of public funds, *this is still our lawsuit.* We cannot escape the fact that Mr. Madden works for us and is under our control. As is evidenced by newspaper editorials dubbing this case *"a bout with the referee,"* there is surely the possibility that the public will perceive something improper is taking place. *It is this appearance of impropriety that makes me uncomfortable with hearing this case and would ordinarily require us to step aside.* [501 N.E.2d at 1273; emphasis added.]

---

[11] The hearing went forward, and Chief Justice Clark read into the record an unusual statement, in effect censuring the Auditor General and his counsel for declining to appear and participate. Hearing of Sept. 16, 1986, Ill. Sup. Ct.

Notwithstanding these concerns, Justice Simon joined with other court members in issuing the mandamus order to Cronson.

Following the completion of the *Madden* case and the trial court's issuance of summary judgment in the instant case, this matter reached the Appellate Court. At several points, the advocates for the Supreme Court's position stressed to the Appellate Court that the Supreme Court had already spoken (albeit extra-judicially) on the audit issues at hand:

> The Illinois Supreme Court has decided the issues herein in favor of plaintiffs and against Cronson. Its decision is binding on and should be followed by this Court. [CBA Brief to Appellate Court at 2.]

In fact, no such case regarding audit of ARDC and BLE had yet formally come before the Illinois Supreme Court. At oral argument, the Appellate Court was again told by one of the plaintiff's counsel:

> You're supposed to be independent but when you have the Supreme Court saying how they feel about the issue, you have to give some deference to that statement. [Statement of CBA counsel, Appendix to Verified Motion to Recuse.]

On May 18, 1989, the Appellate Court issued a divided decision upholding the Supreme Court's position in all respects. App. 6. It ruled that ARDC and BLE were not "state agencies" handling "public funds" and thus were exempt from public audit. "Separation of Powers" grounds previously asserted by the Supreme Court were also adopted by the majority opinion. App. 7. A dissenting opinion was filed by Appellate Justice Jiganti disagreeing with the majority opinion on all issues. App. 27.

Finally, the controversy reached the Illinois Supreme Court in the form of Cronson's Petition for Leave to Appeal. Because of the Supreme Court's prior actions and

involvement, Cronson accompanied his appeal with the Verified Petition to Recuse based on federal due process. He asked that *prior to considering the appeal application*, the court first recuse and temporarily replace four of the seven justices who had caused the matter to be extra-judicially predetermined over the intervening years and who were chiefly responsible for using ARDC and BLE as litigating arms to advance the court's position.[12]

On July 27, 1989, the Supreme Court issued the final orders here in question. It declined to recuse any of the four members who the Auditor General maintained had manifested prejudice, pre-judgment and control of the case. Instead, it bypassed any discussion of the merits of Cronson's federal due process objection, invoked the Rule of Necessity, and denied its own authority to utilize the Illinois Constitution's temporary judicial assignment provision to remedy the situation. App. 1. The court did not comment on the other Illinois statutes and rules providing alternative measures for recusal which Cronson had cited.

The court below then turned to Cronson's petition for leave to appeal on the merits and, in a single sentence order, without explanation, refused his appeal and thereby

---

[12] Cronson relied upon provisions of the Illinois Constitution which authorize the Supreme Court to appoint replacement judges to temporary service on any court. App. 35. Alternatively, he cited provisions from the court's rules and the Illinois Code of Civil Procedure which provide further basis for such recusal. Canon 3(c), Ill. Sup. Ct. Rule 63; Ill Rev. Stat. Ch. 110, §2-1001, reprinted at 23, n. 15, *infra*. On these grounds, he urged a temporary assignment of four justices by lot, *pro hac vice*, to hear the appeal petition, thereby reducing the taint and giving him a fair hearing. He also cited cases in several jurisdictions where similar recusal/substitution measures had been used by state supreme courts to avoid decision-making by justices whose interests or prior positions were disqualifying.

effectively made final and conclusive its own victory in the litigation below. App. 4. Cronson sought rehearing, pointing out that his motion for recusal/substitution did not seek to add members to the court, as the court had characterized it, but merely to displace four justices with substitutes for a single cause. He also suggested several recognized methods of substitution which would avoid any quorum problem. However, this petition for rehearing was summarily denied. App. 5.[13]

REASONS FOR GRANTING THE WRIT

1. Introduction.

This case concerns an abuse of judicial power by the Illinois Supreme Court, which compromised fundamental principles of due process and judicial ethics by acting both as an adversary and an ultimate adjudicator in a controversy of its own making. Although that controversy revolves around questions of state law which are not cognizable in this Court, the blatant unfairness and conflicts of interest in the manner of adjudicating this case implicate—on the most fundamental level—the very concept of due process of law as applied to the States by the Fourteenth Amendment.

[13] Cronson raised his federal due process claims at every level of this litigation. He raised them in the trial court as his First Affirmative Defense (at 15); in the Appellate Court (Notice of Appeal, Par. 5), and in the Illinois Supreme Court (Verified Motion to Recuse and To Appoint Substitute Justices). He asked that the Supreme Court consider and grant that motion *before* taking up his application for appeal. The Due Process Clause of the Fourteenth Amendment was repeatedly invoked in his motion (*e.g.*, Pars. 2(b), 5 and 6) and in its attached Explanatory Memorandum (*e.g.*, at 17, 19, 24).

The State's highest court became enmeshed in a controversy, made prejudgments, litigated its own case in lower courts through its own controlled agencies and employees, and then, when the case came before it for review, meted out a final defeat to its opponent. When the Auditor General sought the court's consideration of federal due process requirements, the court turned the issue aside, instead invoking a state procedural interpretation of "necessity". In the course of this flawed decisional process, the upholding of the court's institutional position concerning the public audit of a portion of its finances became substantial, paramount and disqualifying. For eight years, the Auditor General has found himself in the almost surreal position of waging a bout with the ultimate referee.

The Illinois Appellate Court's majority opinion upholding the Supreme Court's pre-announced position on the merits of the audit dispute involves state law issues and, hence, is not sought to be reviewed here. Rather, the Auditor General's focus is solely upon the decisional process in the Illinois Supreme Court. He seeks only a fair hearing of his application for review before a properly constituted Illinois court.

The Auditor General seeks an order from this Court (1) vacating the orders below which denied recusal and substitution of certain of the justices and which then disposed adversely of the Auditor General's request for review, and (2) remanding for further consideration the necessity for the Illinois court's actions and the availability of measures to remove the due process infirmity.

This case thus provides a needed opportunity for this Court's examination of a form of judicial disqualification which is not based on direct, personal pecuniary interest, as in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986), but, rather, on strongly held institutional positions and

interests which are no less injurious to fair adjudication. In addition, this case affords a needed opportunity for the Court, for the first time, to provide guidelines as to the proper standards for invoking the Rule of Necessity under which due process rights must yield or suffer impairment. Cases such as *United States v. Will*, 449 U.S. 200 (1980), illustrate the use of the doctrine but do not adequately define how sparingly the doctrine is to be invoked.

2. Due Process Required Recusal.

This case presents an extension of the fact situation before the Court in *Lavoie*. There, a state supreme court justice's refusal to recuse himself from a case in which he had a personal pecuniary interest in the outcome was held to rise to the level of a federal due process violation. 475 U.S. at 821, 825. No such personal pecuniary interest is alleged here. But, as Justice Brennan cautioned in his concurring opinion, pecuniary interests are not the only kinds of interests capable of interfering significantly with fair adjudication:

> I do not understand that by this language the Court states that only an interest that satisfies this test [direct, personal, substantial and pecuniary] will taint the judge's participation as a due process violation. Nonpecuniary interests, for example, have been found to require recusal as a matter of due process. . . . [A]s this case demonstrates, an interest is sufficiently "direct" if the outcome of the challenged proceeding *substantially advances the judge's opportunity to attain some desired goal even if that goal is not actually attained in that proceeding.* [*Id.* at 829-830; emphasis added.[14]]

[14] In several cases before *Lavoie*, the Court recognized that personal financial gain by a judge is not the only factor which can exert a pernicious effect on fair decision-making. *See In re Murchi-*

(Footnote continued on following page)

Just such a disqualifying "goal" is present here. The record demonstrates that the Illinois Supreme Court has long been embroiled in a struggle with the Auditor General, that the court from the start was committed to a legal position (*i.e.*, exemption of a portion of its finances from public audit), and that it refused to recede. It has displayed a passionate interest and partisan role, culminating in its own decision (order of April 27, 1989) denying the Auditor General a fair opportunity to gain access to the final step of judicial review before an impartial court.

This case involves millions of dollars of court-assessed funds to support its administrative goals, without official public accountability. As such, it does not differ significantly from the situation in *Ward, supra*, where control of institutional funds by a governmental entity was held by this Court to be a disqualifying factor. 409 U.S. at 60.

Because courts have administrative functions as well as purely judicial ones, occasional entanglement in controversies may be unavoidable. In fact, ARDC and BLE have repeatedly asserted that the court's role in this case was merely to discharge its administrative and supervisory responsibilities. They miss the point. When, as here, a court becomes a disputant, *also* makes extra-judicial announcements of its position on disputed points of substantive law and *then* chooses to use its judicial

---

[14] *continued*

son, 349 U.S. 133, 136 (1955) (judge who presided as a one-man grand jury also presided over contempt proceedings relating to event in the grand jury proceedings); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (Mayor's adjudication of traffic fines, which contributed to city finances, violated due process); *Johnson v. Mississippi*, 403 U.S. 212 (1971) (participation of a judge enmeshed in matters involving petitioner violated due process); *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1970) (judge in a "running, bitter controversy").

authority to prevail against its adversary, the result is not only an unseemly situation injurious to the administration of justice, but unconstitutional.

(a) Due Process precludes a court from deciding its own case.

The fundamental tenet of due process at issue here was clearly stated in *In re Murchison*, 349 U.S. at 136:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. . . . To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.

This Court has also said that "[e]very procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law". *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). To the same effect see *Gibson v. Berryhill*, 411 U.S. 564 (1973), and *Ward, supra.*

The principle is well summarized by a leading commentator as follows:

> This maxim [no one ought to be a judge in his own cause] applies in all cases where judicial functions are to be exercised, and excludes all who are interested, however remotely, from taking part in their exercise. It is not left to the discretion of a judge, or to his sense of decency, to decide whether he shall act or not; all his powers are subject to this absolute limitation; and *when his own rights are in question, he has no authority to determine the cause.* Nor is it essential that the judge be a party named in the record; *if the suit is brought or defended in his interest . . . he is equally excluded as if he were the party named.* [T.M. Cooley, *Constitutional Limitations*, (8th Ed. Vol. II) Ch. XI at 870-871 (1927); emphasis added.]

There can be no doubt that ARDC and BLE are *alter egos* of the Illinois Supreme Court. Just as action by the administrative bar regulatory agencies of a state supreme court constitutes "state action" in which the court itself becomes the real party in interest, see *Bates v. State Bar of Arizona*, 433 U.S. 350, 361 (1977), the same result necessarily occurs when such an agency acts for a state supreme court in launching and conducting litigation. That court is unquestionably the true plaintiff and real party in interest. The resulting action is the court's own lawsuit. *Cf. Hoover v. Ronwin*, 466 U.S. 558, 570-574 (1984).

In sum, the appropriate test here is not confined to whether the conflicting interest of the court is a personal, pecuniary one. Rather, it is whether the court has a stake in the matter, of whatever kind, sufficiently substantial to undermine the chances for fairness. Applying that test here, how likely is it that the judicial balance was held "nice, clear and true" when the Auditor General came before the Illinois Supreme Court as an applicant for relief? The answer is self-evident.

(b) The court prejudged the issues.

The Illinois court's extensive involvement in its own controversy in violation of the *Murchison* doctrine is exacerbated by the unusual history of prejudgments recounted above. The extent of this prejudgment is acknowledged by the comment of Justice Simon in his special concurring opinion in *Madden*, where he said:

> *Not all* the current members of the court have taken a position with respect to the Commission and Board funds. [501 N.E.2d at 1272; emphasis added.]

Likewise, the Federal District Court in *Cronson v. Clark*, although it denied Cronson's Section 1983 action to enjoin the Supreme Court's self-initiated mandamus hearing, acknowledged that:

> In the present matter . . . complainant has presented testimony and other communications of [Illinois Supreme] court members tending to show a possible prejudgment of the issues involved. [645 F.Supp. at 797.]

As seen above, on at least five occasions since 1977, the Illinois Supreme Court "decided" the issues by pronouncing its legal position on the scope of Cronson's audit authority. The court brought these views to bear by litigating against Cronson through its two instrumentalities, ARDC and BLE. Finally, it dealt Cronson's legal position a fatal blow as the court of last resort by refusing to review the split decision of the intermediate Appellate Court. That final act is impugned by the magnitude of the court's institutional financial stake in the matter. On these facts, the need for recusal was and is inescapable.

Whether or not prejudgments, standing alone, always rise to the level of constitutional due process violations, *cf. FTC v. Cement Institute*, 333 U.S. 683, 702-703 (1948); *Lavoie*, 475 U.S. at 820, the extensive record of predisposition presented here, when combined with the Illinois court's significant role as an affected, litigation-controlling party in the case below, plainly constitute a fundamental due process infringement.

3. Due Process Precluded Resort To An Alleged "Rule Of Necessity".

Whether the Rule of Necessity has been properly invoked is a federal question in this case because the doctrine was here used to vitiate federal procedural due process rights where other options were clearly available. Further, where the state court which purports to interpret its own "necessity" as a matter of procedural state law is itself under a disability to adjudicate that question because of self-interest, this Court reserves to itself a means of reviewing such actions.

United States v. Will, supra, is this Court's leading decision involving the Rule of Necessity. There, however, the "necessity" for a decision was so obvious (no federal judge could escape some impact from the subject matter of the case—judicial salaries) that there was no occasion to determine how extreme a necessity is required before due process principles must be compromised. This Court observed in *Will* that necessity arises ". . . where no provision is made for calling another in, or where no one else can take his place. . . ." 449 U.S. at 214. But beyond this, no standard of "necessity" was articulated.

By contrast, state court decisions over many years have developed a standard which is relatively clear and exacting: the only "necessity" which justifies trenching upon due process rights is one so strong that the court is literally left without any options at all. A leading compilation on the subject thus describes the standard:

> The application of the rule permitting a disqualified judge to act where no other judge is available can be justified *only by strict and imperious necessity*, since the rule is an *exception to the greater rule of disqualification* resting on sound public policy. Under the doctrine, a disqualified judge may sit where no decision is possible if he does not sit, as in the case of an appellate court *where there is no method provided by constitution or statute to have another person sit* as judge of the court if a member is disqualified. [46 Am.Jur.2d *Judges* § 90 at 156; emphasis added.]

Commentators also cite a leading state court decision as illustrative of the rule. In *State ex rel. Miller v. Aldridge*, 212 Ala. 660, 103 So. 835 (1925), the court adverted to the maxim that "no man is to be judge of his own cause" and observed:

> It may be gathered from all the authorities that the courts [are] very generally agreed that . . . the rule of disqualification is paramount policy, and is

only to yield when the necessity is *so great and overwhelming that there may not be an entire failure of justice.* [103 So. at 838; emphasis added.]

The need here is for this Court to articulate an equally rigorous federal standard for proper use of the Rule of Necessity.

4. This Court May Consider Whether The Court Below Was Left Without Options.

Had the Illinois court chosen to utilize its inherent authority and the broad grant of temporary assignment power given it by the State Constitution and by other provisions as well[15], its decision would surely have gone unchallenged as a proper and final interpretation of state law. Here, however, the court elected a different course. It opted for a narrow reading of its own discretionary appointive

---

[15] Article VI, Section 16 of the Illinois Constitution reads, in pertinent part:

> General administrative and supervisory authority over all courts is vested in the Supreme Court and shall be exercised by the Chief Justice in accordance with its rules . . . . The Supreme Court may assign a Judge temporarily to any court and an Associate Judge to serve temporarily as an Associate Judge on any Circuit Court . . . . [App. 35.]

Other state law provisions provide mechanisms whereby four justices can step aside. These were pointed out to the court below. The State's Code of Judicial Conduct, expressly made applicable to the high court, provides for disqualification for acts of bias, prejudice and conflicts of interest. Canon 3(c), Ill. Sup. Ct. Rule 63; Ill.Rev.Stat., Ch. 110(a), Sec. 63. Finally, the Illinois Code of Civil Procedure provides, in pertinent part:

> . . . A change of venue in any civil action may be had in the following situations: (1) where the judge is a party or interested in the action . . . .
>
> * * *
>
> (b) When a change of venue is granted, it may to be to some other judge in the same county, or in some other convenient county . . . . [Ill.Rev.Stat., Ch. 110, Sec. 2-1001.]

powers, needlessly limiting its ability to control its docket and then labeling this procedure a "necessity".

Because a paramount federal issue is involved, this Court is not precluded from reviewing the Illinois court's interpretation of the state law procedural measures to consider whether they do, in fact, make "provision for appointment of another judge".[16] The prerogative of independent federal scrutiny is especially essential in the unique circumstance where a court, relying upon a discretionary state law interpretation, is itself a litigant whose capacity to decide the issue fairly is directly in question.

The Illinois Constitution's temporary assignment provision—"the Supreme Court may assign a Judge temporarily to any court"—is not a substantive state law but a procedural one. Further, it is discretionary in nature.[17] While as a general rule, this Court will decline to review state court judgments which rest upon independent and adequate state grounds, this rule does not apply where the state ground is purely procedural and discretionary and would operate to shut off this Court's review of important constitutional questions. See *Urie v. Thompson*, 337 U.S. at 172-173 (1949) ("Local rules of practice cannot bar

---

[16] *Cf. Will*, 449 U.S. at 213-214. *See also Urie v. Thompson*, 337 U.S. 163, 174 (1949) (state supreme court's definition of negligence subject to independent review by this Court when subsidiary to larger federal questions); *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 121 (1954) (duty rests on this Court to decide for itself the facts or state constructions upon which federal constitutional issues rest); *Hysler v. Florida*, 315 U.S. 411, 417 (1942) (independent examination of applicability of state-determined standards valid where due process rights involved).

[17] This provision plainly applies to Supreme Court justices. In fact, it was, in part, a response to an earlier constitutional crisis resulting in withdrawal from the court of two justices charged with misconduct coinciding with the death of a third. Commentary of E. Gertz, Proc. of 6th Ill. Constitutional Convention (1970), Vol. II at 707.

this Court's independent consideration of all substantial federal questions. . . .") In *Lawrence v. State Tax Comm'n*, 286 U.S. 276, 282 (1932), this Court said:

> Even though the claimed constitutional protection be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a *fair or substantial* basis. If unsubstantial, constitutional obligations may not be thus avoided. [Emphasis added.]

Likewise, in *Williams v. Georgia*, 349 U.S. 375, 383 (1955), this Court held that where state courts are given a discretion regarding an independent state procedural ground, the refusal of the court below to exercise such a discretion and address the federal issue cannot deter this Court from determining that what occurred "is, in effect, an avoidance of the federal right."

In words well adapted to the instant cause, this Court added:

> We conclude that the . . . State Supreme Court declined to grant [petitioner's] motion though possessed of power to do so under state law. Since his motion was based upon a constitutional objection, and one the validity of which has in principle been sustained here, the discretionary decision to deny the motion does not deprive this court of jurisdiction to find that the substantive issue is properly before us. [*Id.* at 389.]

See also L. Tribe, *American Constitutional Law* (2nd Ed.) Sec. 3-24 at 169 (1988); G. Gunther, *Constitutional Law* (11th ed.) at 61-62 (1985).

In short, state procedural interpretations, particularly discretionary ones, cannot be used to defeat review by this Court of cases seeking to vindicate fundamental federal

rights.[18] In view of the Illinois court's failure to utilize the discretion given to it, it would follow that there was and is no "necessity" here.

The strained interpretation of the court below, leading to its determination of "necessity", progressed in four steps. First, it determined that its temporary assignment powers under Article VI, Sections 15 and 16 applied to "vacancy" situations only. Second, it apparently assumed that only a death or retirement of a justice (not a disqualification from service in a single case, as here) could constitute a "vacancy". Third, the court concluded that without such permanent "vacancies", temporary assignment of impartial justices would impermissibly overstaff the court by creating a complement of more than seven justices. Finally, the court suggested that recusal/substitution of four members would not work, in any event, because once the four recused justices stepped aside (apparently assumed to occur in a single bloc), the remaining three would lack a quorum and thus be powerless to appoint disinterested replacements. (App. 2).

This analysis cannot stand even superficial scrutiny. As can be readily seen, Article VI, Section 16 of the Illinois charter does not require the declaration of a "vacancy" before temporary assignments can be made to the Supreme Court. Even assuming, however, that the requirement of a "vacancy" must be engrafted upon the section, the court below without justification refused to view the

[18] Even assuming, *arguendo*, that the Illinois court's faulty construction of its own assignment power is impervious to any independent examination by this Court under principles of federalism, any construction which would categorically prevent members of the Illinois high court from stepping aside, regardless of the extent of bias, prejudgment and control of litigation against the defendant, would be *per se* unconstitutional. *Cf. Groppi v. Wisconsin*, 400 U.S. 505, 507-508 (1971).

temporary incapacity of a justice due to disqualification as a "vacancy".[19] This extraordinarily restrictive reasoning also led to the erroneous conclusion that Cronson's motion would actually enlarge the court to a size (over seven justices) exceeding that prescribed by the Illinois Constitution. Obviously, Cronson's motion, seeking a one-for-one displacement of judges, *pro hac vice*, sought to do no such thing.

Nor would the proper use of a "by lot" or serial replacement process have stripped the court of an acting quorum, as suggested in its order. In numerous States with judicial assignment powers which are no greater and, in some cases, less explicit than the Illinois constitutional provisions, individual justices, and even entire supreme courts, have recused themselves to ensure fairness. See *Mosk v. Superior Court of Los Angeles County*, 25 Cal.3d 474, 159 Cal.Rptr. 494, 601 P.2d 1030 (1979) (six of seven members of the California Supreme Court disqualified themselves and the Chief Justice appointed six temporary justices by lot); *Yelle v. Kramer*, 83 Wash.2d 464, 520 P.2d 927 (1974) (the entire Washington Supreme Court disqualified itself after having appointed, by lot, a full temporary court of seven judges); *State Board of Law Examiners v. Spriggs*, 61 Wyo. 70, 155 P.2d 285, *cert. denied*, 325 U.S. 886 (1945) (full Wyoming Supreme Court disqualified itself and appointed judges to serve in its stead). In none of these cases did the courts find it necessary to erect interpretive barriers to their powers of recusal and sub-

[19] "Vacancy", in its ordinary sense, obviously includes the situation of disqualification in a single case, as has been recognized in other jurisdictions. See *e.g.*, *Lewis v. Board of Trustees of the Employee Retirement System of the State of Hawaii*, 66 Hawaii 304, 660 P.2d 36, 37 (1983), where in place of a disqualified justice, another judge had been assigned "by reason of vacancy." To the same effect, see *State of Hawaii v. Hall*, 66 Hawaii 300, 660 P.2d 33 (1983).

stitution by raising artificial numerical limitations or purported quorum problems.[20] App. 1-2.

The Illinois Supreme Court has been given a discretion on a matter of state procedure to recuse and replace members in appropriate cases. Though it clearly could have done so, it chose not to exercise that discretion, and issued a ruling avoiding the federal due process issue. There was no imperative necessity warranting such a course of action.

CONCLUSION

The facts demonstrate that the recusals sought by the Auditor General are required under the Federal Constitution. At a minimum, the two orders at issue should be vacated and remanded to the Illinois Supreme Court with

[20] The alleged quorum problem set up by the Illinois Supreme Court would never occur if it simply followed the lead of its sister States and appointed the four replacements through a random or "by lot" procedure *before* stepping aside. *Cf. Yelle v. Kramer, supra.*

directions to further consider use of appropriate means under Illinois law for proper resolution of this controversy by a detached and impartial tribunal.

Respectfully submitted,

Of Counsel:

E. BARRETT PRETTYMAN, JR.
HOGAN & HARTSON
Columbia Square
Suite 1300 West
555 13th Street, N.W.
Washington, D.C. 20004
(202) 637-5600

LEGRAND L. MALANY
600 South Rosehill
Springfield, Illinois 62704
(217) 525-1132

SAMUEL W. WITWER, SR.
SAMUEL W. WITWER, JR.
Counsel of Record
WITWER, BURLAGE, POLTROCK & GIAMPIETRO
125 South Wacker Drive
Suite 2700
Chicago, Illinois 60606
(312) 332-6000

Attorneys for Petitioner

Special Assistant Attorneys General
of the State of Illinois

APPENDICES

INDEX TO APPENDICES

Appendices A and A-1

Appendix A attached is a true copy of an opinion order filed in the Illinois Supreme Court on July 27, 1989 by Justice Daniel P. Ward, denying a supervisory order on Petitioner's Verified Motion to Recuse/and Substitute Justices, *pro hac vice.* Concurrently separate and identical orders were filed by Justices William G. Clark, Howard C. Ryan and Chief Justice Thomas J. Moran.

Separate and identical concurrences were concurrently filed by Justice Horace S. Calvo and Justice Ben Miller in the form of Appendix A-1 being the order of Justice Calvo. So far as is known no order on the motion was filed by Justice John J. Stamos.

APPENDIX A

No. 68831

IN THE
SUPREME COURT OF ILLINOIS

CHICAGO BAR ASSOCIATION, ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION, and STATE BOARD OF LAW EXAMINERS OF THE SUPREME COURT OF ILLINOIS, *et al.*,

Respondents,

v.

ROBERT G. CRONSON, Auditor General of the State of Illinois,

Movant.

ORDER

This cause coming to be heard on the motion of movant, objections having been filed by respondents Attorney Registration and Disciplinary Commission and State Board of Law Examiners of the Supreme Court of Illinois, and the court being fully advised in the premises, finds that:

Although this court has the authority to assign a judge temporarily to any court (Ill. Const. 1970, art. VI, sec. 16) and to assign any retired judge, with his consent, to judicial service (Ill. Const. 1970, art. VI, sec. 15(a)), no such assignment may be made to the supreme court, unless there is a vacancy. The Constitution provides that the supreme court shall consist of seven members (Ill. Const.

1970, art. VI, sec. 3). If four members of this court were to recuse themselves and four other judges were to be assigned to this court, then the Supreme Court of Illinois would consist of more than seven members. There is just no provision in the Constitution to accommodate the relief requested by the petitioner.

Also, the Constitution requires that a concurrence of four members of this court is necessary for a decision. If four members of this court were to recuse themselves, the remaining three members would not have the authority to assign other judges to this court or to fill vacancies on this court.

For these reasons I feel that the rule of necessity, in addition to the other reasons argued by the respondents, compel me to vote to deny the motion for supervisory order recusing Chief Justice Moran, Justice Clark, Justice Ryan and Justice Ward, and appointing substitute Justices to this cause.

IT IS ORDERED that the motion for supervisory order recusing Chief Justice Moran, Justice Clark, Justice Ryan and Justice Ward, and appointing substitute Justices for this cause is denied.

/s/ DANIEL P. WARD
Justice

[FILED JULY 27, 1989
SUPREME COURT CLERK]

APPENDIX A-1

No. 68831

IN THE
SUPREME COURT OF ILLINOIS

CHICAGO BAR ASSOCIATION, ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION, and STATE BOARD OF LAW EXAMINERS OF THE SUPREME COURT OF ILLINOIS, *et al.*,

Respondents,

v.

ROBERT G. CRONSON, Auditor General of the State of Illinois,

Movant.

JUSTICE CALVO specially concurring:

Not having been named among those members of the court whose recusal is sought in the motion of the movant for a supervisory order, I concur in the denial of the motion.

[FILED JULY 27, 1989
SUPREME COURT CLERK]

APPENDIX B

No. 68831

IN THE
SUPREME COURT OF ILLINOIS

CHICAGO BAR ASSOCIATION, ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION, and STATE BOARD OF LAW EXAMINERS OF THE SUPREME COURT OF ILLINOIS, *et al.*,

Respondents,

vs.

ROBERT G. CRONSON, Auditor General of the State of Illinois,

Movant.

Motion for a supervisory order
pursuant to Rule 383

ORDER

This cause coming to be heard on the petition of the petitioner, answers having been filed by the respondents, and the court being fully advised in the premises;

IT IS ORDERED that the petition for leave to appeal is [*denied*].

[FILED JULY 27, 1989
SUPREME COURT CLERK]

APPENDIX C

No. 68831

IN THE
SUPREME COURT OF ILLINOIS

The Chicago Bar Association, et al.,

Respondents

v.

Robert G. Cronson, Auditor General, etc.,

Petitioner

Appeal from Appellate Court — First District
1-87-2634 — 82L50131

ORDER

It is ordered that the motion of petitioner for leave to file a motion for reconsideration of the order of July 27, 1989, denying the petition for leave to appeal is denied.

It is further ordered that the motion of petitioner for reconsideration of the order of July 27, 1989, denying the motion to recuse and to appoint substitute justices is denied.

[FILED AUGUST 29, 1989
SUPREME COURT CLERK]

APPENDIX D

[Filed May 18, 1989]

No. 87-2634

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT – FOURTH DIVISION

THE CHICAGO BAR ASSOCIATION, ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS, and STATE BOARD OF LAW EXAMINERS OF THE SUPREME COURT OF ILLINOIS, *et al.*,

Plaintiffs-Counterdefendants-Appellees,

v.

ROBERT G. CRONSON, Auditor General of the State of Illinois,

Defendant-Counterplaintiff-Appellant.

Appeal from the Circuit Court of Cook County.
Honorable David J. Shields, Judge Presiding.

JUSTICE McMORROW delivered the opinion of the court:

Robert G. Cronson, Auditor General of the State of Illinois (the Auditor General), appeals from an order of the circuit court of Cook County determining that the Auditor General has no authority to conduct an audit of the funds of the Attorney Registration and Disciplinary Commission

of the Supreme Court of the State of Illinois (the Disciplinary Commission) or the funds of the State Board of Law Examiners of the Supreme Court of the State of Illinois (the Board of Law Examiners).

We conclude that the Auditor General's audit of the funds of the Disciplinary Commission and the Board of Law Examiners was not envisioned in Article VIII of the 1970 Illinois Constitution (Ill. Const. 1970, art. VIII) or in that constitutional provision's statutory codification in the Illinois State Auditing Act. (Ill. Rev. Stat. 1987, ch. 15, pars. 301-1 *et seq.*) We further determine that the Auditor General's audit of the funds of the Disciplinary Commission and the Board of Law Examiners, with report of said audit to the General Assembly and the Governor, would violate the separation-of-powers clause of the 1970 Illinois Constitution. (Ill. Const. 1970, art. II, sec. 1.) We also conclude that no genuine issues of material fact appeared in the record to prevent summary judgment. Consequently, we affirm the trial court's order.

The instant cause was initiated when the Chicago Bar Association (the CBA), a not-for-profit association composed primarily of Illinois attorneys who practice law in the Chicago area, and other plaintiffs who had paid a fee to either the Board of Law Examiners or the Disciplinary Commission, filed a complaint for declaratory and other relief against the Auditor General, the Disciplinary Commission, and the Board of Law Examiners. In this complaint, the CBA sought a declaration that the Illinois Constitution and applicable statutes do not authorize the Auditor General to audit the funds of the Disciplinary Commission or the Board of Law Examiners. The trial court re-aligned the Disciplinary Commission and the Board of Law Examiners as plaintiffs in the CBA suit. Thereafter, the Disciplinary Commission and the Board of Law Examiners filed a complaint similar to that filed by the CBA.

The Auditor General answered the complaints and filed a counterclaim against the CBA, the Disciplinary Commission, and the Board of Law Examiners. This counterclaim sought a declaration that the Auditor General does possess the authority, pursuant to the 1970 Illinois Constitution and applicable statutes, to conduct audits of the funds of the Disciplinary Commission and the Board of Law Examiners. Parties filed appropriate responses or replies to these pleadings. Following discovery, the CBA, the Disciplinary Commission, the Board of Law Examiners, and the Auditor General all filed cross-motions for summary judgment. The following stands undisputed in the record.

The Auditor General has sought to perform an audit of the receipt and use of the funds administered by the Disciplinary Commission and the Board of Law Examiners since 1977. It is the Auditor General's position that these entities are state agencies, that they are each administered by public funds, and that their audit by the Auditor General would not violate separation of power principles provided for in the 1970 Illinois Constitution. The Disciplinary Commission and the Board of Law Examiners have refused audit by the Auditor General on the ground that they are not state agencies administering public funds within the scope of Article VIII or the Illinois State Auditing Act, and, pursuant to principles of separation of powers, cannot be audited by the Auditor General.

In 1933, the Illinois Supreme Court commissioned the Board of Governors of the Illinois State Bar Association and the Board of Managers of the CBA to investigate and make such charges of attorney misconduct as may be necessary, pursuant to then Supreme Court Rule 41. (Ill. Rev. Stat. 1933, ch. 110, par. 259.) The activities of these bar associations in this regard were funded wholly from the associations' private fees from attorneys who were

members of the organizations. The supreme court altered this arrangement in 1973 by the creation of the present Disciplinary Commission pursuant to rules of the Illinois Supreme Court (see 107 Ill. 2d Rules 751 to 774), which assists the court in its registration of persons licensed to practice law in this State, and in the court's investigation and discipline of misconduct of those attorneys so registered. (See 107 Ill. 2d R. 752.) Members of the Commission, and the Administrator of the Commission, are appointed by the Illinois Supreme Court. (107 Ill. 2d Rules 751, 752.) To fund the Commission's performance of its duties, the Disciplinary Commission collects and administers a disciplinary fund. (107 Ill. 2d R. 751(e)(5).) The only source of this disciplinary fund is a registration fee which must be paid on an annual basis by each attorney admitted to practice law in this State. (107 Ill. 2d R. 756.) The Disciplinary Commission is not funded from any form of state taxation or revenue, its funds are not appropriated by, authorized by, or otherwise governed by enactments of, the Illinois legislature, and the Disciplinary Commission utilizes no State facilities, equipment, property, or supplies. The Disciplinary Commission's funds are also not paid to, or maintained by, the State Treasurer. An independent audit of the funds of the Disciplinary Commission has been conducted each year by a private accounting firm. (107 Ill. 2d R. 751(e)(5).) This audit has been submitted to the Illinois Supreme Court and published each year in the Disciplinary Commission's annual public report. See 107 Ill. 2d R. 751(e)(5).

The Board of Law Examiners was created in 1897 pursuant to the rules of the Illinois Supreme Court (Ill. S.Ct. R. 39, 168 Ill. 20, currently codified at 107 Ill. 2d Rules 701 to 709) to assist the court in its investigation and disposition of applications submitted by persons seeking

to be admitted to the Illinois bar. (See 107 Ill. 2d Rules 704, 705, 709.) The Board is composed of individuals appointed by the Illinois Supreme Court. (107 Ill. 2d R. 702.) To fund the Board's performance of its duties, the Board of Law Examiners collects and administers an application fund. (107 Ill. 2d R. 706.) The only source of this fund is an application fee which must be paid by each person seeking to be admitted to the Illinois bar. (107 Ill. 2d R. 702(c).) Similar to the Disciplinary Commission, the Board of Law Examiners is not funded from any form of state taxation or revenue, its funds are not appropriated by, authorized by, or otherwise governed by enactments of, the Illinois legislature, and the Board of Law Examiners utilizes no State facilities, equipment, property, or supplies. The accounts of the Board of Law Examiners are also not paid to or maintained by the State Treasurer. The Board of Law Examiners' funds are audited each year by a private accounting firm and reported to the Illinois Supreme Court. (107 Ill. 2d R. 702(d).) Funds collected in excess of the expenses of the Board of Law Examiners are applied "as the Court may from time to time direct." 107 Ill. 2d R. 702(d).

The trial court determined that the Disciplinary Commission and the Board of Law Examiners are not state agencies administering public funds within the scope of the Auditor General's powers found in Article VIII of the 1970 Illinois Constitution and the Illinois State Auditing Act. The trial court further determined that the Auditor General's audit of the funds of the Disciplinary Commission and the Board of Law Examiners would violate principles of separation of powers. Based upon these determinations, the trial court entered summary judgment in favor of the CBA, the Disciplinary Commission, and the Board of Law Examiners. The Auditor General's appeal followed.

OPINION

The Auditor General argues that he is an officer of constitutional rank whose powers include the audit of all public funds of this State. The Auditor General maintains that he has the constitutional duty to audit the funds of the Disciplinary Commission and the Board of Law Examiners, because both are state agencies that administer public funds. However, the question presented in this appeal is not simply whether the Board of Law Examiners and the Disciplinary Commission are, in a broad or general sense, state agencies using public funds. Rather, the issue presented here is a more narrow one, *i.e.*, whether the Board of Law Examiners and the Disciplinary Commission are state agencies administering public funds subject to the audit powers of the Auditor General pursuant to Article VIII of the 1970 Illinois Constitution and the Illinois State Auditing Act.

Article VIII provides a comprehensive scheme for the control, management, and audit of State finances, to ensure that public funds are used for public purposes and that reports of the use of public funds made available to citizens of this State. (See, *e.g.*, 7 Report of Proceedings, Sixth Illinois Constitutional Convention 2007 et seq. (Report of the Committee on Revenue and Finance) (hereinafter cited as Proceedings).) To achieve these objectives, Article VIII first sets out that "[p]ublic funds, property or credit shall be used only for public purposes." (Ill. Const. 1970, art. VIII, sec. 1(a).) It further provides, "The State, units of local government and school districts shall incur obligations for payment or make payments from public funds only as authorized by law or ordinance." (Ill. Const. 1970, art. VIII, sec. 1(b).) In addition, "[r]eports and records of the obligation, receipt and use of public funds of the State, units of local government and school

districts are public records available for inspection by the public according to law." Ill. Const. 1970, art. VIII, sec. 1(c).

Article VIII accords to the Governor the power to prepare a yearly State budget, "set[ting] forth the estimated balance of funds available for appropriation at the beginning of the fiscal year, the estimated receipts, and a plan for expenditures and obligations during the fiscal year * * *." (Ill. Const. 1970, art. VIII, sec. 2(a).) The Governor "shall * * * submit" this budget to the General Assembly. (Ill. Const. 1970, art. VIII, sec. 2(a).) Although the Governor prepares and submits the State budget, it is the General Assembly that must authorize expenditures in accordance with the Governor's proposed budget; thus, Article VIII states, "The General Assembly by law shall make appropriations for all expenditures of public funds by the State." Ill. Const. 1970, art. VIII, sec. 2(b); see also Ill. Const. 1970, art. IX, sec. 1.

Article VIII thereafter mandates that the "General Assembly shall provide by law for the audit of the obligation, receipt and use of public funds of the State." (Ill. Const. 1970, art. VIII, sec. 3(a).) It further provides, "The Auditor General shall conduct the audit of public funds of the State. He shall make additional reports and investigations as directed by the General Assembly. He shall report his findings and recommendations to the General Assembly and to the Governor." (Ill. Const. 1970, art. VIII, sec. 3(b).) The 1970 Illinois Constitution gives no definition for the term "public funds."

The Illinois State Auditing Act is designed to "implement[*] Article VIII, Section 3 of the Constitution, and shall be construed in furtherance of those provisions." (Ill. Rev. Stat. 1987, ch. 15, par. 301-2(a).) The Act "is intended

to provide a comprehensive and thorough post audit of the obligation, expenditure, receipt and use of public funds of the State under the direction and control of the Auditor General, to the end that the government of the State of Illinois will be accountable to the General Assembly and the citizens and taxpayers, and to the end that the constitutional and statutory requirements governing state fiscal and financial operations will be enforced." (Ill. Rev. Stat. 1987, ch. 15, par. 301-2(b).) In the furtherance of these objectives, the Act is "intended to govern the Auditor General under the control and direction of the General Assembly" (Ill. Rev. Stat. 1987, ch. 15, par. 301-2(b)) and expressly recognizes the Auditor General as a "legislative officer of the State under the [1970 Illinois] Constitution." Ill. Rev. Stat. 1987, ch. 15, par. 301-2(c).

The Act does not define the term "public funds," and states simply that the phrase "public funds of the State" "has the meaning ascribed to that term in Article VIII of the Constitution." (Ill. Rev. Stat. 1987, ch. 15, par. 301-18.) The Act defines "state agencies" as follows:

> "all officers, boards, commissions and agencies created by the Constitution, whether in the executive, legislative or judicial branch, but other than the circuit court; all officers, departments, boards, commissions, agencies, institutions, authorities, universities, bodies politic and corporate of the State; and administrative units or corporate outgrowths of the State government which are created by or pursuant to statute, other than units of local government and their officers, school districts and boards of election commissioners; all administrative units and corporate outgrowths of the above and as may be created by executive order of the Governor." Ill. Rev. Stat. 1987, ch. 15, par. 301-7.

The Illinois State Auditing Act states that the "Auditor General has jurisdiction over all State agencies to make post audits and investigations authorized by or under this Act or the Constitution." (Ill. Rev. Stat. 1987, ch. 15, par. 303-1.) A "post audit" or "audit" is "a post facto examination of books, documents, records, and other evidence relating to the obligation, receipt, expenditure or use of public funds of the State, including governmental operations relating to such obligation, receipt, expenditure, or use." (Ill. Rev. Stat. 1987, ch. 15, par. 301-12.) A post audit or audit may be "a financial audit, a management audit or a program audit, * * * or some combination thereof." Ill. Rev. Stat. 1987, ch. 15, par. 301-12.

Financial audits are generally designed to determine "whether the audited agency has obligated, expended, received and used public funds of the State in accordance with the purpose for which such funds have been appropriated or otherwise authorized by law * * *." (Ill. Rev. Stat. 1987, ch. 15, par. 301-13.) The Auditor General is obligated by the Act to perform a financial audit of each State agency at least once during every biennium. (Ill. Rev. Stat. 1987, ch. 15, par. 303-2.) In conducting these required financial audits, the Auditor General is permitted to "inquire into and report upon matters properly within the scope of a management or program audit * * *." (Ill. Rev. Stat. 1987, ch. 15, par. 303-2.) A management audit determines whether the audited agency is managing or utilizing its funds in an economical and efficient manner. (Ill. Rev. Stat. 1987, ch. 15, par. 301-14.) A program audit determines whether the agency's objectives are being achieved efficiently and effectively through the use of public funds. Ill. Rev. Stat. 1987, ch. 15, par. 301-15.

Upon completion of an audit, the Auditor General "shall submit a copy of each audit report to the [Legislative

audit] Commission, the Governor, the Speaker and minority leader of the House of Representatives and the President and minority leader of the Senate." (Ill. Rev. Stat. 1987, ch. 15, par. 303-14.) The Auditor General must also submit quarterly reports of his activities to the Legislative Audit Commission, and annual reports summarizing all audits, investigations and special studies to the Legislative Audit Commission, the General Assembly, and the Governor. Ill. Rev. Stat. 1987, ch. 15, par. 303-15.

In order to determine the scope of Article VIII and the Illinois State Auditing Act with respect to the Auditor General's power to audit the funds of the Board of Law Examiners and the Disciplinary Commission, we must ascertain the plain and ordinary meaning of Article VIII and the Illinois State Auditing Act in the constitutional and legislative contexts in which they appear. See, *e.g.*, *United Citizens of Chicago and Illinois v. Coalition to Let the People Decide in 1989* (1988), 125 Ill. 2d 332, 338-39, 531 N.E.2d 802.

When the powers and duties of the Auditor General are placed in the constitutional and legislative scheme whereby the legislative post of Auditor General is created, the powers of the position are defined, and the branches of State government to which the Auditor General must report are specified, it is readily apparent that the role of the Auditor General is to conduct audits with respect to all funds appropriated or otherwise authorized by the General Assembly following the Governor's preparation and submission of the State budget. Included in the scope of the Auditor General's jurisdiction are those public funds, appropriated or otherwise authorized by legislative enactment, that are in the care of state agencies created by the Illinois Constitution, by legislative enactment, or by executive order, including those funds appropriated by the

General Assembly to the Illinois Supreme Court. See *Madden v. Cronson* (1986), 114 Ill. 2d 504, 501 N.E.2d 1267.

Because the Auditor General must audit funds appropriated or otherwise authorized by the General Assembly after preparation and submission of the Governor's budget, especially when those funds are expended by agencies created in the Illinois Constitution, state statute, or executive order, the Auditor General must report his findings to the General Assembly and the Governor. (See 2 Proceedings 889, 914 (remarks of Delegate Brannen); 2 Proceedings 916 (remarks of Delegate Coleman); 2 Proceedings 918 (remarks of Delegate Elward); 2 Proceedings 913, 919 (remarks of Vice President Smith); 5 Proceedings 4215, 4254, 4471 (remarks of Delegate Durr); 5 Proceedings 4214 (remarks of Delegate Mullen); 5 Proceedings 4217 (remarks of Delegate Coleman); 7 Proceedings 2037 (Committee Report).) As stated at the Sixth Illinois Constitutional Convention, "The purpose of the post-audit section is to fix responsibility in the legislature to follow up to see that the appropriations which they pass are in fact used for the purposes which they intended in the passage of the appropriation bills." 2 Proceedings 889 (remarks of Delegate Brannen).

However, the funds of the Disciplinary Commission and the Board of Law Examiners are not appropriated or otherwise authorized by laws enacted by the General Assembly, nor are they provided for in the annual budget of the Governor. The Disciplinary Commission and the Board of Law Examiners receive no funds by legislative appropriation or authorization, and do not depend upon a legislative or executive grant of authority to collect or administer their application or disciplinary fees. Neither the 1970 Illinois Constitution, statutes adopted by the

General Assembly, nor executive order of the Governor, set forth the powers, structures, or policies of the Disciplinary Commission or the Board of Law Examiners. The functions of the Disciplinary Commission and the Board of Law Examiners fall within the inherent, exclusive, constitutional powers of the Illinois Supreme Court. (See Ill. Const. 1970, art. VI, secs. 1, 16; *People ex rel. Brazen v. Finley* (1988), 119 Ill. 2d 485, 492-93, 519 N.E.2d 898; *In re Loss* (1987), 119 Ill. 2d 186, 518 N.E.2d 981; *In re Day* (1899), 181 Ill. 73, 54 N.E. 646.) Both the Disciplinary Commission and the Board of Law Examiners are created by Illinois Supreme Court rules adopted pursuant to the supreme court's inherent, exclusive constitutional authority. In addition, the duties, structure, and authority to collect and administer funds of the Board of Law Examiners and the Disciplinary Commission derive exclusively from rules of the Illinois Supreme Court. Thus the Disciplinary Commission and the Board of Law Examiners do not fall within the scope of the audit scheme of Article VIII or the Illinois State Auditing Act.

The Auditor General argues that the Disciplinary Commission and the Board of Law Examiners fall within the scope of the term "state agency" as defined in the Illinois State Auditing Act. As noted previously, the Act defines "state agency" as follows:

> "all officers, boards, commissions and agencies created by the Constitution, whether in the executive, legislative or judicial branch, but other than the circuit court; all officers, departments, boards, commissions, agencies, institutions, authorities, universities, bodies politic and corporate of the State; and administrative units or corporate outgrowths of the State government which are created by or pursuant to statute, other than units of local government and their officers, school districts and boards of election com-

missioners; all administrative units and corporate outgrowths of the above and as may be created by executive order of the Governor." Ill. Rev. Stat. 1987, ch. 15, par. 301-7.

In our view, the plain language of the definition of "state agency" in the Illinois State Auditing Act does not include the Disciplinary Commission or the Board of Law Examiners. The definition of "state agency" contains the general categories of agencies created by the Constitution and agencies created by statute or executive order. Neither the Disciplinary Commission nor the Board of Law Examiners is "created by the Constitution," nor is either "created by or pursuant to statute" or "created by executive order."

The Auditor General also asserts that the Illinois Supreme Court is a "state agency" under the Illinois State Auditing Act because the supreme court is created by and in the Illinois Constitution. The Auditor General further notes that the Disciplinary Commission and the Board of Law Examiners are created by the Illinois Supreme Court pursuant to the court's grant of constitutional authority to perform the public purpose of regulating the admission and practice of law in this State. Based on these observations, the Auditor General concludes that the Disciplinary Commission and Board of Law Examiners should also be state agencies. The Auditor General contends that this interpretation would be consistent with the intent of the drafters of Article VIII and the Illinois State Auditing Act that the Board of Law Examiners and the Disciplinary Commission be subject to his audit powers.

It is axiomatic that in discerning the drafters' intent with respect to Article VIII of the 1970 Constitution and the Illinois State Auditing Act, we must consider the objectives the drafters sought to achieve. (See, *e.g.*, *McCastle*

v. Sheinkop (1987), 121 Ill. 2d 188, 193, 520 N.E.2d 293.) The purpose of the Auditor General's audit of public funds is to ensure that agencies entrusted with those funds will be accountable to the branch of State government that has authorized the agency's receipt, obligation, and use of public funds, and to the branch of State government that is capable of rectifying any irregularity in that agency's malfeasance or nonfeasance with respect to those funds. (See, *e.g.*, 2 Proceedings 913 (remarks of Vice President Smith); 2 Proceedings 914 (remarks of Delegate Brannen); 5 Proceedings 4214 (remarks of Delegate Mullen); 5 Proceedings 4217 (remarks of Delegate Coleman); 5 Proceedings 4215, 4254, 4471 (remarks of Delegate Durr).) However, neither the General Assembly nor the Governor possesses the constitutional or statutory authority to alter, modify, or in any manner affect the duties, powers, composition, structure, or operation of the Board of Law Examiners or the Disciplinary Commission. In addition, neither the Illinois Legislature nor the Governor has the authority to regulate the admission or practice of law in this State. Consequently, we determine that the drafters of Article VIII of the 1970 Illinois Constitution and the Illinois State Auditing Act did not contemplate the Auditor General's aduit of the funds of the Disciplinary Commission and the Board of Law Examiners, with report of his audit to the General Assembly and the Governor.

The Auditor General also maintains that his audit of the accounts of the Board of Law Examiners and the Disciplinary Commission is necessary to ensure that both entities are fully accountable to the public regarding their receipt, obligation, and use of their admission and disciplinary funds. In this regard the Auditor General argues that the term "public funds of the State" must be given the same meaning in both section 1 of Article VIII (re-

garding public report of use of public funds) and in section 3 of Article VIII (regarding audit of public funds by Auditor General). The Auditor General contends that if the funds of the Board of Law Examiners and the Disciplinary Commission are not "public funds of the State" subject to the Auditor General's authority under section 3, then their funds are not governed by section 1 regarding public report of the use of public funds. The Auditor General maintains that a failure to require the public disclosure of the use of the funds of the Board of Law Examiners and the Disciplinary Commission, under section 1, would contradict the clear intent of the drafters of Article VIII that "public funds of the State" include "the broadest possible concept of the use of public funds." (5 Proceedings 4218 (remarks of Delegate Whalen); see also 2 Proceedings 878 (remarks of Delegate Netsch to the effect that the term "public funds of the State" in draft section 2 of Article VIII, eventually renumbered to section 1(c) in the 1970 Illinois Constitution, intended to include use of public funds by judicial and legislative branches).) However, the question presented in the instant cause is not whether the funds of the Board of Law Examiners and the Disciplinary Commission fall within the scope of section 1 of Article VIII, and we therefore do not resolve that question herein. Furthermore, because Illinois Supreme Court Rules require public report of the use and audit of the funds of the Board of Law Examiners and the Disciplinary Commission, the nondisclosure which the Auditor General fears does not arise.

The Auditor General maintains that because he audits the collection and administration of license fees of approximately 70 other professions or occupations (such as physicians, nurses, accountants, veterinarians, etc.), he should also audit the collection and administration of the admis-

sion and disciplinary fees collected by the Board of Law Examiners and the Disciplinary Commission. The professional and occupation fees audited by the Auditor General are collected and administered by agencies created by the General Assembly, not the Illinois Supreme Court. (See, *e.g.*, Ill. Rev. Stat. 1987, ch. 111, pars. 1201 to 1236 (architects), 1701-1 to 1704-22 (barbers), 4401 to 4478 (physicians), 5801 to 5835 (real estate brokers).) Also, the agencies that collect and administer these professional or occupation fees expend funds that are included in the Governor's proposed budget, appropriated or authorized by the Illinois legislature, and deposited into the State Treasury in accordance with laws enacted by the General Assembly. (See, *e.g.*, Ill. Rev. Stat. 1987, ch. 130, par. 7.) As a result, the professional or occupation fees referred to by the Auditor General are significantly distinguishable from the admission and disciplinary funds of the Board of Law Examiners and the Disciplinary Commission.

The Auditor General also notes that he audits substantial sums of non-appropriated monies which need not be immediately submitted to the State Treasury. The Auditor General asserts that these non-appropriated funds are substantially similar to the admission and disciplinary funds collected and administered by the Board of Law Examiners and the Disciplinary Commission. The non-appropriated funds to which the Auditor General refers have been authorized by the General Assembly pursuant to statute, and legislative enactment determines whether or when the funds must be paid over to the State Treasurer. (See, *e.g.*, Ill. Rev. Stat. 1987, ch. 127, par. 167.02; see also, *e.g.*, Ill. Rev. Stat. 1987, ch. 108½, pars. 14-101 to 14-151 (Illinois State Employees Retirement System); Ill. Rev. Stat. 1987, ch. 121, pars. 100-1 to 100-35 (Illinois State Toll Highway Authority); Ill. Rev. Stat. 1987, ch.

67½, pars. 301 to 334 (Illinois Housing Development Authority).) Thus the non-appropriated funds, unlike the admission and disciplinary funds of the Board of Law Examiners and the Disciplinary Commission, depend upon a legislative grant of authority for their existence. Also, these non-appropriated funds are held by agencies created by legislative enactment.

The Auditor General also argues that his audit of the funds of the Disciplinary Commission and the Board of Law Examiners, with report of this audit to the General Assembly and the Governor, would not violate the principles of the separation of powers. The 1970 Illinois Constitution states that the "legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another." (Ill. Const. 1970, art. II, sec. 1.) "[I]f a power is judicial in character, the legislature is *expressly prohibited* from exercising it. [Citations.]" (*People v. Joseph* (1986), 113 Ill. 2d 36, 41, 495 N.E.2d 501 (emphasis in original).) The common law has long recognized that the admission and regulation of the practice of law in this State is an exclusive function of the Illinois Supreme Court, and is within the scope of the supreme court's inherent "judicial power." (See, *e.g.*, *People ex rel. Brazen v. Finley* (1988), 119 Ill. 2d 485, 492-93, 519 N.E.2d 898; *In re Day* (1899), 181 Ill. 73, 54 N.E. 646.) This inherent judicial power includes the authority to compel the collection of the admission and disciplinary fees provided for in Illinois Supreme Court rules. (See *Sharood v. Hatfield* (1973), 296 Minn. 416, 210 N.W.2d 275.) We note that the Auditor General has not challenged the power of the Illinois Supreme Court to create the Board of Law Examiners or the Disciplinary Commission, or to authorize their collection of admission or disciplinary funds.

Because the Board of Law Examiners and the Disciplinary Commission are creatures of Illinois Supreme Court rule, and because their collection and administration of funds derive exclusively from a judicial grant of authority from the Illinois Supreme Court, it is for the Illinois Supreme Court, not the General Assembly or the Governor, to determine whether the Disciplinary Commission or the Board of Law Examiners has properly discharged the responsibilities delegated to them by the Illinois Supreme Court, and to determine whether the Board of Law Examiners or the Disciplinary Commission has utilized its funds according to the particularized purposes for which each was created by the Illinois Supreme Court. Since the Board of Law Examiners and the Disciplinary Commission are created by supreme court rule, collect their funds solely by virtue of a judicial grant of power, and administer matters within the inherent, exclusive authority of the Illinois Supreme Court, audit of the funds of the Board of Law Examiners and the Disciplinary Commission by the Auditor General would work more than a mere peripheral effect on the court's exercise of its inherent judicial power to regulate the admission and practice of law in this State. (See *Joseph*, 113 Ill. 2d at 43.) The Auditor General's duties include the performance of financial audits, management audits, program audits, investigations, and special studies, either on the initiative of the Auditor General, or upon the direction of the Legislative Audit Commission or the General Assembly. (See Ill. Rev. Stat. 1987, ch. 15, pars. 303-2 to 303-5.) Reports of any audit, investigation or study must be made to the General Assembly, which may authorize further audit, investigation, or study if deemed appropriate by either the General Assembly or the Legislative Audit Commission. (See Ill. Rev. Stat. 1987, ch. 15, pars. 303-2 to 303-5.) Each of these audits, with resulting report and the possibility of remedial recommendations or further investigation by the General Assembly, the Legis-

lative Audit Commission, or the Governor, would be highly intrusive into the court's inherent power to regulate the manner in which the Board and the Commission are structured, in which they function, and in which they obligate and use their funds.

The Auditor General suggests that he has agreed to perform no more than a financial audit of the funds of the Board of Law Examiners and the Disciplinary Commission. The Auditor General asserts that his agreement to limit the scope of his audits will obviate any potential encroachment into the supreme court's inherent judicial power to regulate the admission and practice of law in this State. Even a limited financial audit must be submitted to both the General Assembly and the Governor. (See Ill. Rev. Stat. 1987, ch. 15, par. 303-14.) Furthermore, the Auditor General's powers under the 1970 Illinois Constitution and the Illinois State Auditing Act include not only financial audits, but also management and program audits, as well as investigations and special studies directed by the General Assembly or the Legislative Audit Commission. (See Ill. Rev. Stat. 1987, ch. 15, pars. 303-2 to 303-5.) We cannot sanction the Auditor General's partial derogation of this constitutional and statutory mandate, nor can the Auditor General agree to act in contravention to the very grant of his constitutional and statutory authority. *Cf. Madden v. Cronson* (1986), 114 Ill. 2d 504, 501 N.E.2d 1267.

The cases relied upon by the Auditor General support our conclusion that the Auditor General is not granted the authority, under the 1970 Illinois Constitution or the Illinois State Auditing Act, to audit the funds of the Board of Law Examiners or the Disciplinary Commission. In each Illinois Supreme Court decision relied upon by the Auditor General, public funds or assets were administered by agencies created by the Illinois Constitution, the General Assembly, or the Governor, and actions taken

with respect to the public funds or assets were authorized by legislative enactment. (See *Droste v. Kerner* (1966), 34 Ill. 2d 495, 217 N.E.2d 73; *Fergus v. Brady* (1917), 277 Ill. 272, 115 N.E. 393; *Board of Trade of City of Chicago v. Cowen* (1912), 252 Ill. 554, 96 N.E. 1084; see also Ill. Rev. Stat. 1987, ch. 85, pars. 901 *et seq.* (Illinois Public Funds Act).) Our decision is also in accord with similar cases from other jurisdictions. (See *In re Washington State Bar Association v. Graham* (1976), 86 Wash.2d 624, 548 P.2d 310; *Ex parte Auditor of Public Accounts* (Ky. 1980), 609 S.W.2d 682; see also *State Licensing Board of Contractors v. State Civil Service Commission* (1959), 110 So.2d 847, *aff'd.*, 240 La. 231, 123 So.2d 76.) The decision of *Attorney Registration and Disciplinary Commission v. Harris* (1984), 595 F.Supp. 107 is also consistent with the result we reach herein, since the court ruled in that case that the Disciplinary Commission is not a "state agency" whose members and employees are entitled to social security coverage.

The Auditor General also contends, in the alternative, that the trial court should have denied the motion for summary judgment of the CBA, the Board of Law Examiners, and the Disciplinary Commission, because the record reveals genuine issues of material fact. We have reviewed the record, but find no material factual disputes between the parties. Accordingly, we find no error in the trial court's allowance of the motion for summary judgment submitted by the CBA, the Board of Law Examiners, and the Disciplinary Commission. (See, *e.g.*, *D.B. Corkey Co. v. Koplin* (1988), 176 Ill. App. 3d 1096, 531 N.E.2d 1044.) This conclusion is not altered upon consideration of the exhibits excluded by the trial court, assuming solely for the purpose of analysis that those exhibits should not have been excluded.

In summary, when the powers of the Auditor General are placed in the constitutional and legislative scheme whereby the legislative post of Auditor General is created, the powers of the position are defined, and the branches of State government to which the Auditor General must report are specified, it is readily apparent that the role of the Auditor General is to conduct audits with respect to all funds appropriated or otherwise authorized by the General Assembly following the Governor's preparation and submission of the State budget. The functions of the Disciplinary Commission and the Board of Law Examiners fall within the inherent, exclusive, constitutional powers of the Illinois Supreme Court. Both the Disciplinary Commission and the Board of Law Examiners are created by Illinois Supreme Court rules adopted pursuant to the supreme court's inherent, exclusive constitutional authority. In addition, the duties, structure, and authority to collect and administer funds of the Board of Law Examiners and the Disciplinary Commission derive exclusively from rules of the Illinois Supreme Court.

In light of these considerations, we determine that Article VIII of the 1970 Illinois Constitution and the Illinois State Auditing Act do not contemplate the Auditor General's audit of the funds of the Disciplinary Commission and the Board of Law Examiners, with report of his audit to the General Assembly and the Governor. We further conclude that principles of separation of powers preclude the Auditor General's audit of the funds of the Board of Law Examiners and the Disciplinary Commission.

For the reasons stated, the judgment of the circuit court of Cook County is affirmed.

AFFIRMED.

JOHNSON, J., concurs.

JIGANTI, P.J., dissents.

PRESIDING JUSTICE JIGANTI, dissenting:

The Illinois Constitution mandates that the Auditor General of Illinois audit "public funds." (Ill. Const. 1970, art. VIII, §3.) A plain reading of the constitutional audit provisions leads to the conclusion that the funds of the Attorney Registration and Disciplinary Commission and the Board of Examiners are public funds. The report of the Committee on Revenue and Finance of the Illinois Constitutional Convention removes whatever doubt remains as to whether these funds are public funds. The report states that the objective of article VIII is "to assure that the Illinois citizen has the broadest possible access to information on the fiscal condition and operations of state and local governments, so that he may hold his elected officials accountable for their performance in office." (7 Record of Proceedings, Sixth Illinois Constitutional Convention 2007 (Report of the Committee on Revenue and Finance).) The Illinois legislature used similar language, which will be discussed subsequently, in enacting the Illinois State Auditing Act. Ill. Rev. Stat. 1987, ch. 15, par. 301-2(b).

The general focus of this appeal is article VIII of the Constitution entitled "Finance." (Ill. Const. 1970, art. VIII.) More specifically, it concerns the interpretation of the words "public funds." That term is found in all four sections of article VIII. The pertinent provisions are:

> "§1. General Provisions
>
> (a) *Public funds*, property or credit shall be used only for public purposes.
>
> (b) The State, units of local government and school districts shall incur obligations for payment or make payments from *public funds* only as authorized by law or ordinance.
>
> * * *

§2. State Finance

(a) The Governor shall prepare and submit to the General Assembly, at a time prescribed by law, a State budget for the ensuing fiscal year. The budget shall set forth the estimated balance of funds available for appropriation at the beginning of the fiscal year, the estimated receipts, and a plan for expenditures and obligations during the fiscal year of every department, authority, public corporation and quasi-public corporation of the State, every State college and university, and every other public agency created by the State, but not of units of local government or school districts. The budget shall also set forth the indebtedness and contingent liabilities of the State and such other information as may be required by law. Proposed expenditures shall not exceed funds estimated to be available for the fiscal year as shown in the budget.

(b) The General Assembly by law shall make appropriations for all expenditures of *public funds* by the State. Appropriations for a fiscal year shall not exceed funds estimated by the General Assembly to be available during that year.

§3. State Audit and Auditor General

(a) The General Assembly shall provide by law for the audit of the obligation, receipt and use of *public funds* of the State. The General Assembly, by a vote of three-fifths of the members elected to each house, shall appoint an Auditor General and may remove him for cause by a similar vote. * * *

(b) The Auditor General shall conduct the audit of *public funds* of the State. He shall make additional reports and investigations as directed by the General Assembly. He shall report his findings and recommendations to the General Assembly and to the Governor.

§4. Systems of Accounting, Auditing and Reporting

The General Assembly by law shall provide systems of accounting, auditing and reporting of the obligation, receipt and use of *public funds*. These systems shall be used by all units of local government and school districts." (Emphasis added.)

As mandated by the Constitution, the General Assembly appointed an Auditor General and enacted the Illinois State Auditing Act. (Ill. Rev. Stat. 1985, ch. 15, par. 301-1 *et seq.*) Section 1-2(a) of the Act specifically states that the Act implements article VIII, section 3, of the Constitution and should be construed in furtherance of those provisions. (Ill. Rev. Stat. 1985, ch. 15, par. 301-2(a).) Section 1-2(b) states that the Act is "intended to provide a comprehensive and thorough post audit of the obligation, expenditure, receipt and use of public funds of the State * * * to the end that the government of the State of Illinois will be accountable to the General Assembly and the citizens and taxpayers, and to the end that the constitutional and statutory requirements governing state fiscal and financial operations will be enforced." (Ill. Rev. Stat. 1985, ch. 15, par. 301-2(b).) Section 3-1 states that "[t]he Auditor General has jurisdiction over all State agencies to make post audits and investigations authorized by or under this Act or the Constitution." Ill. Rev. Stat. 1985, ch. 15, par. 303-1.

The plaintiffs make four arguments in opposing the asserted power of the Illinois Auditor General to audit the funds of the Board of Bar Examiners and the Attorney Registration and Disciplinary Commission. The plaintiffs first argue that the funds of the Board and the Commission are not public funds of the State because they arise from the inherent power of the supreme court to license and discipline attorneys and not from the Constitution.

Second, they argue that the funds of these two agencies do not comport with the definition of public funds as stated in article VIII of the Constitution. Third, the parties argue that even if the Illinois Constitution gives the legislature power to allow the Auditor General to audit the funds of the Board and Commission, the wording of the Illinois State Auditing Act as enacted by the legislature does not encompass these two agencies. Finally, it is argued that the Act as applied to these agencies violates the constitutional doctrine of separation of powers.

The plaintiffs' first argument stems from the proposition that the supreme court has inherent authority to regulate the admission of attorneys to the bar and to discipline attorneys. Consequently, the legislature must defer to the judiciary in the exercise of its inherent power. (*People v. Joseph* (1986), 113 Ill. 2d 36, 495 N.E.2d 501; see also *People ex rel. Bier v. Scholz* (1979), 77 Ill. 2d 12, 394 N.E.2d 1157.) The fact that the registration and discipline of attorneys is a power inherent in the judiciary is beyond cavil. However, it is a *non sequitur* to say that because such inherent power exists. the legislature may not enact legislation in the same area. The legislature is prohibited from doing so only if its legislation unduly encroaches upon the inherent powers of the court. *People v. Joseph* (1986), 113 Ill. 2d 36, 47, 495 N.E.2d 501; *Agran v. Checker Taxi Co.* (1952), 412 Ill. 145, 149, 105 N.E.2d 713.

The parties in this proceeding do not make any argument that an audit will intrude upon the inherent powers of the court. The majority nevertheless comments that an audit by the Auditor General "would work more than a mere peripheral effect on the court's exercise of its inherent judicial power to regulate the admission and practice of law in this State." Similarly, the majority suggests that the audits "would be highly intrusive into the court's

inherent power * * *." To gain some perspective on the issue of legislative intrusion into the inherent powers of the court, it must be remembered that under article VIII of the Constitution the Auditor General is commanded to audit public funds of the State. Pursuant to this constitutional mandate, the Illinois Supreme Court in the case of *Madden v. Cronson* (1986), 114 Ill. 2d 504, 501 N.E.2d 1267, *cert. denied* (1987), 98 L. Ed. 2d 36, 108 S. Ct. 73, issued a *mandamus* to the Auditor General commanding that he audit the funds of the supreme court itself. Without a claim by the supreme court that an audit of its own funds is intrusive and without an argument made by the parties in this case that an audit is intrusive, I fail to see how the majority can hold that an audit would be highly intrusive into the court's exercise of its inherent power. Consequently, I do not believe the inherent power doctrine is a limitation on the power or duty of the Auditor General.

The second argument is that the funds of the Board and the Commission are not public funds as defined by article VIII of the Constitution. The majority holds that public funds are those that are appropriated or otherwise authorized by legislative enactment or by executive order. I believe that holding is based upon a misreading of article VIII and places undue emphasis on section 2 of article VIII which is entitled "State Finance." That section establishes the Governor's authority and responsibility for submitting a comprehensive budget and also in submitting a balanced budget. (Ill. Ann. Stat., 1970 Const., art. VIII, §2(a), Constitutional Commentary, at 138 (Smith-Hurd 1971).) Section 2 also provides at subsection (b) that the General Assembly shall make appropriations of all expenditures of public funds. I do not believe that section 2 can be properly interpreted as restricting other provisions in

article VIII to a definition that public funds are only those appropriated or otherwise authorized by legislative enactment or by executive order.

The section concerning State finance is only one of four sections contained in article VIII. The other three sections clearly evince a scheme, as stated by the committee of the Constitutional Convention that drafted the article, to assure Illinois citizens the broadest possible access to information of the operations of not only the State but also of local governments so that the citizens can hold elected officials accountable for their performance in office. (7 Record of Proceedings, Sixth Illinois Constitutional Convention 2007 (Report of the Committee on Revenue and Finance).) For example, section 1(a) of article VIII provides that public funds, without qualification, shall be used only for public purposes. Section 1(b) is equally expansive in stating that "[t]he State, units of local government and school districts" shall incur obligations or make payments from public funds as authorized by law or ordinance. As explained by Robert A. Helman and Wayne W. Whalen in the Constitutional Commentary to section 1(b), the use of the terms "State, units of local government and school districts" is intended to cover all entities of State and local government. (Ill. Ann. Stat., 1970 Const., art. VIII, §1(b), Constitutional Commentary, at 127 (Smith-Hurd 1971).) Section 3(b), in considering all governments, provides for the audit by the Auditor General of State funds. Section 4 provides that the General Assembly shall provide auditing systems for the remainder of the government, that is, units of local government and school districts.

In my view, the term "public funds" must be considered in light of the intention of the Constitution to encompass all government in the State of Illinois, as expressed in

article VIII considered as a whole. It must also be considered in light of the report of the Committee on Finance, quoted above, which states the obvious rationale of article VIII. The Auditor General has the right and the duty to audit funds of the Board and the Commission, which are entities created by the supreme court. The right of the Auditor General to audit the funds in question is not limited by the existence of the inherent power of the supreme court because it is not asserted in any way that the right to audit infringes upon the exercise of this inherent power. It is for these reasons that I would conclude that the Constitution commands that the funds of these two agencies be audited by the Auditor General.

The plaintiffs' third argument is that the Illinois Auditing Act, as enacted by the legislature, does not encompass the funds of the Commission or the Board. The Act, designed to implement the constitutional audit provisions, defines "State agencies" as follows:

> "[A]ll officers, boards, commissions and agencies created by the Constitution, whether in the executive, legislative or judicial branch, but other than the circuit court; all officers, departments, boards, commissions, agencies, institutions, authorities, universities, bodies politic and corporate of the State; and administrative units or corporate outgrowths of the State government which are created by or pursuant to statute, other than units of local government and their officers, school districts and boards of election commissioners; all administrative units and corporate outgrowths of the above and as may be created by executive order of the Governor." (Ill. Rev. Stat. 1987, ch. 15, par. 301-7.)

The comprehensive sweep of this definition is striking. It leaves no doubt that all agencies of State government are subject to audit by the Auditor General. The supreme

court itself is clearly encompassed by this definition as an agency or institution of State government. As such, the court receives appropriated funds subject to public audit. (See *Madden v. Cronson* (1986), 114 Ill. 2d 504, 512, 501 N.E.2d 1267, *cert. denied* (1987), 98 L. Ed. 2d 38, 108 S. Ct. 73.) The Board and Commission, as "administrative units" of the court, are also State agencies within the purview of this definition. If the supreme court itself can be audited, under what rationale can one of its own agencies claim exemption from audit? The funds in question here are committed by supreme court rule to the public purpose of regulating the State bar. Thus, the Board and Commission are State agencies administering public funds.

The final argument made by the plaintiffs involves the constitutional doctrine of separation of powers. It is the Constitution itself which gives the Auditor General the power to audit all public funds of the State regardless of the particular branch of government which holds them. I do not believe it can be said that the Auditor General, by fulfilling his constitutional mandate, is violating that same Constitution.

For the foregoing reasons, I respectfully dissent from the opinion of the majority.

APPENDIX E

Excerpts from Illinois Constitution and Illinois State Auditing Act

CONSTITUTION

ARTICLE VI

Section 15: *Retirement—Discipline*

(a) The General Assembly may provide by law for the retirement of Judges or Associate Judges at a prescribed age. Any retired Judge or Associate Judge, with his consent, may be assigned by the Supreme Court to judicial service * * *

* * *

Section 16: *Administration*

General administrative and supervisory authority over all Courts is vested in the Supreme Court and shall be exercised by the Chief Justice in accordance with its rules. The Supreme Court may assign a Judge temporarily to any Court and an Associate Judge to serve temporarily as an Associate Judge on any Circuit Court.

* * *

ARTICLE VIII

Section 1: *General Provisions*

(c) Reports and records of the obligation, receipt and use of public funds of the State . . . are public records available for inspection by the public according to law.

* * *

Section 3: *State Auditor and Auditor General*

(a) The General Assembly shall provide by law for the audit of the obligation, receipt and use of public funds of the State. The General Assembly by vote of three-fifths

of the members elected to each house, shall appoint an Auditor General and may remove him for cause by a similar vote.

* * *

(b) The Auditor General shall conduct the audit of public funds of the State.

* * *

ILLINOIS ANNOTATED STATUTES (1988)
Chapter 15, Section 301-1 *et seq.*

301-2. Purpose and construction

§ 1-2. Purpose and construction.

(a) This Act implements Article VIII, Section 3 of the Constitution, and shall be construed in furtherance of those provisions.

(b) This Act is intended to provide a comprehensive and thorough post audit of the obligation, expenditure, receipt and use of public funds of the State under the direction and control of the Auditor General, to the end that the government of the State of Illinois will be accountable to the General Assembly and the citizens and taxpayers, and to the end that the constitutional and statutory requirements governing state fiscal and financial operations will be enforced.

* * *

301-7. State agencies

§ 1-7. "State agencies" means all officers, boards, commissions and agencies created by the Constitution, whether in the executive, legislative or judicial branch but other than the circuit court; . . . all administrative units and corporate outgrowths of the above and as may be created by executive order of the Governor.

* * *

302-4. Oath

§ 2-4. Oath. Each prospective Auditor General, before taking office, shall take and subscribe to the oath or affirmation prescribed by Section 3, Article VIII, of the Constitution.

* * *

302-6. Removal for cause

§ 2-6. Removal for cause. (a) Cause for removal includes incompetence, neglect of duty, malfeasance in office, and violation of the prohibitions of Section 2-7 of this Act.

* * *

303-1. Jurisdiction of Auditor General

§ 3-1. Jurisdiction of Auditor General. The Auditor General has the jurisdiction over all State agencies to make post audits and investigations authorized by or under this Act or the Constitution.

* * *

303-11. Maintenance of records

§ 3-11. Maintenance of records. All records, files, work papers and other material maintained by the Auditor General shall be available for public inspection, except as otherwise provided by regulation or to the extent that information contained therein is made confidential or privileged by law.

§ 3-12. The Auditor General may institute and maintain any action or proceeding to secure compliance with this Act and the regulations adopted hereunder.

APPENDIX F

Excerpts from Reply of Plaintiffs Chicago Bar Association, et al. (pp. 1-4)

Filed January 13, 1987

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – LAW DIVISION

82 L 50131

THE CHICAGO BAR ASSOCIATION, ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS, AND STATE BOARD OF LAW EXAMINERS OF THE SUPREME COURT OF ILLINOIS, et al.,

Plaintiffs and Counter-Defendants,

vs.

ROBERT G. CRONSON, AUDITOR GENERAL OF THE STATE OF ILLINOIS,

Defendant and Counter-Plaintiff.

REPLY OF THE CHICAGO BAR ASSOCIATION (CBA), ET AL., PLAINTIFFS, TO SUPPLEMENT TO REPLY OF CRONSON, AUDITOR GENERAL, DEFENDANT

CBA's consistent position throughout this proceeding has been that the Board of Law Examiners and the Attorney Registration and Disciplinary Commission, both established

by Rules of the Illinois Supreme Court (also plaintiffs), are not "State Agencies" but agencies of the Supreme Court, and that their monies, collected from applicants and lawyers, are not "Public Funds."

CBA submits that the foregoing also has been the consistent opinion of the Illinois Supreme Court and its members. That has been apparent from various statements and writings of the Justices and Court Administrators referred to in CBA's previous Memoranda filed in this case.[1] This Court should give due deference to those opinions and follow the same.

---

[1] Among the statements and writings of the Justices and Court Administrators are the following:

* * * * *

In due course, the Court rendered its decision ordering that the Writ of Mandamus, as sought by Madden, issue. In its opinion, through Justice Goldenhersh, a copy of which is attached hereto, the Court addressed the issue of whether the funds of the Board and the Commission were "Public Funds." It said:

> "--- In 1977, the court directed the Board of Law Examiners (Board) and the Attorney Registration and Disciplinary Commission (Commission) to refuse defendant's demand that he be permitted to conduct a performance audit of their records. The refusal to permit the audit was based on the conclusion that since the funds collected and expended by the Board and Commission were not subject to the appropriation provisions of article VIII of the Constitution, they were not "public funds" within the contemplation of article VIII ---"

* * * * *

CBA's contentions are sound. This Court should find that Cronson does not have any right to audit the funds, books, files and records of the Board or the Commission.

Respectfully submitted,

/s/ RICHARD J. PHELAN

/s/ ROSEANN OLIVER

/s/ JOHN F. MCCARTHY

Attorneys for
The Chicago Bar Association
and others, plaintiffs

APPENDIX G

(Letterhead Of)

NEIL F. HARTIGAN
ATTORNEY GENERAL
STATE OF ILLINOIS
SPRINGFIELD
62706

March 10, 1986

Mr. Richard J. Phelan
Phelan, Pope & John, Ltd.
180 North Wacker Drive, Suite 500
Chicago, Illinois 60601

Dear Mr. Phelan:

You are hereby authorized to appear and you are designated as Special Counsel to the State of Illinois for the fiscal year ending June 30, 1986 for the purpose of representing the Supreme Court of Illinois in filing a mandamus as requested by William M. Madden, Acting Director of the Illinois Courts. The Office of the Attorney General shall take no part in the direction or control of your activities in this litigation. The compensation for your services shall be in accordance with the attached contract.

This appointment is conditional on your compliance with the Attorney General's Code of Conduct as revised April 21, 1981, a copy of which is enclosed.

Please evidence your acceptance of this appointment and its terms by signing the original of this letter in the space provided and return same to this office.

Sincerely,

/s/ NEIL F. HARTIGAN (RVS)
Attorney General

I accept the appointment and agree to its terms. I acknowledge receipt of the Code of Conduct (Rev. 1981), have examined the same this 13th day of March, 1986, and agree to be bound by its terms.

By: RICHARD J. PHELAN

APPENDIX H

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

No. 82 L 50131

THE CHICAGO BAR ASSOCIATION, ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS, and STATE BOARD OF LAW EXAMINERS OF THE SUPREME COURT OF ILLINOIS, et al.,

Plaintiffs and Counter-Defendants,

vs.

ROBERT G. CRONSON, AUDITOR GENERAL OF THE STATE OF ILLINOIS,

Defendant and Counter-Plaintiff.

JUDGMENT ORDER

This cause having been heard on Cross Motions for Summary Judgment filed by the Chicago Bar Association (Chicago Bar), the Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois (Commission), the State Board of Law Examiners of the Supreme Court of Illinois (Board) on one side and Robert Cronson, Auditor General of the State of Illinois (Auditor General) on the other side and the Court having reviewed the pleadings

and written submissions of the parties, having heard and considered the evidence and exhibits presented in open court, having heard the arguments of able Counsel and being otherwise fully advised of the record made in this proceeding, finds:

1. That the Auditor General is an officer of the legislative branch of Illinois state government being appointed by three-fifths of the members of each house of the General Assembly pursuant to Article VIII, Section 3(a) of the Illinois State Constitution.

2. That the Chicago Bar, original plaintiff herein, is a voluntary organization of over 19,000 lawyers licensed to practice in the State of Illinois.

3. The Commission, existing pursuant to Supreme Court Rules 751-774 administers attorney registration and disciplinary functions delegated to it by the Supreme Court. It and its functions are funded solely by the registration fees paid pursuant to Supreme Court Rule 756(a). Its disciplinary fund and accounts are independently audited and proper audit results are filed annually with the Supreme Court pursuant to Rule 751(e)(5) and are available to any and all interested parties.

4. That the Board exists pursuant to Supreme Court Rules 701 to 709 and consists of members of the bar appointed by the Supreme Court to determine the qualifications of those seeking admission to the bar through the conduct of the Illinois Bar Examination and otherwise. It is funded entirely by monies received from applicants for admission to the bar as fees for examination and admission. Its treasurer is independently audited annually pursuant to Supreme Court Rule 702(d).

5. No funds received by or used by either the Commission or the Board are deposited into the state treasury

nor are they placed under the control of the State Treasurer. The fees received by the Board in excess of its expenses are specifically subject to the direction of the Supreme Court.

6. This action was originally filed by the Chicago Bar naming the Auditor General, the Commission and the Board as defendants seeking a declaratory judgment that the Auditor General was not entitled nor authorized to conduct an audit of either the Commission or the Board. Thereafter the Commission and Board were realigned as plaintiffs, an action seeking declaratory relief against the Auditor General to prohibit him from conducting an audit of either entity. He answered and filed a counterclaim seeking such authority to which counterclaim both the Commission and Board filed answers. The summary judgment motions being ruled upon herein followed.

Based upon the foregoing and after a thorough review of the applicable statutes and authorities, the Court concludes:

A. That the funds collected by the Commission and Board from those seeking to practice law in the state of Illinois are not 'public funds' nor 'state revenues' as they are not secured by the imposition of any form of taxation or placed in any way under control of the state treasury. No funds whatever are appropriated by the legislature or authorized for expenditure for the activities or purposes of either the Commission or the Board. The funds are not such as are defined by the Constitution or the Auditing Act (Ill. Rev. Stat., Chap. 15, Sec. 301-18).

B. The Auditing Act directs the Auditor General to audit each 'State Agency' during each biennium. It defines 'State Agencies' as follows (Ill. Rev. Stat., Chap. 15, Sec. 301-7):

> " 'State agencies' means all officers, boards, commissions and agencies created by the Constitution, whether in the executive, legislative or judicial branch, but other than the circuit court; all officers, departments, boards, commissions, agencies, institutions, authorities, universities, bodies politic and corporate of the State; and administrative units or corporate outgrowths of the State government which are created by or pursuant to statute, other than units of local government and their offices, school districts and boards of election commissioners; all administrative units and corporate outgrowths of the above and as may be created by executive order of the Governor."

Neither the Commission nor the Board fit within the definition of a State Agency as defined by the statute cited. Each is created by Rules of the Supreme Court, not by the Constitution. Neither is an 'administrative unit or corporate outgrowth of state government which are created by or pursuant to statute.' Both serve solely as independent functionaries for the Supreme Court created, directed and solely responsible to the directions of the Supreme Court under its rules without any input whatever from the legislature, the state treasury, the executive or otherwise. Neither the Commission nor the Board is a 'Board' of the State or an 'Agency' of the State under the Auditing Act. The Auditor General has authority to audit from the Constitution as made specific by the cited statute and it is clear that neither the Commission nor the Board are created by the Constitution, the legislature, or are outgrowths of state government, creations of statute nor creations by executive order of the Governor. Accordingly, the Auditor General has no authority to conduct their audit.

C. The Constitution, without any serious argument, separates clearly the legislative, executive and judicial functions. The legislative branch is constitutionally man-

dated to provide for an audit of *its* receipt and use of funds. To do so *it* appoints an auditor. That auditor, the Auditor General, is a legislative officer. The judicial power rests in the Supreme Court, and under Article II, Sec. 1 of the Constitution the legislative branch is expressly prohibited from exercising judicial authority. This doctrine, known as 'Separation of Powers', clearly prohibits any intrusion into a judicial function by a legislative officer. The power to admit a lawyer to practice, to discipline, disbar, suspend or otherwise to consider an entitlement to practice is an exclusive function of the Supreme Court, and its creation of a Commission and a Board to serve these functions is clearly protected by the Doctrine of Separation of Powers. As is indicated in the various memoranda presented, this has been the consistent holding of courts throughout this country whenever such an issue arises. (Graham, State Auditor v. Washington State Bar, 548 P.2d 310 (Wash.1976); Ex Parte Auditor of Public Accounts, 609 S.W.2d 682 (Ky.1980); Laughlin v. Clephane, 77 F. Supp. 103 (Dist.Ct.,D.C.,1947); Sharood v. Hatfield, 210 N.W. 2nd 275 (Minn.1973) and others.

Wherefore, in accord with the foregoing findings and conclusions it is ordered,

1. That there are no material issues of fact, and disposition of this matter by summary judgment is appropriate.

2. That the Plaintiffs' motions for Summary Judgment are granted.

3. That the Defendant's motion for Summary Judgment is denied.

4. That the Auditor General has no authority to conduct an audit of the Commission or the Board as described herein.

5. That the issues created by the pleadings herein are resolved in favor of the Plaintiffs on their complaints and the issues are resolved against the Defendant on his counterclaim.

6. That each party shall bear their respective costs and expenses in these proceedings.

7. That there shall be a 30 day stay in the enforcement of this order to allow any party the right to duly consider an appeal, but there is no just reason to thereafter delay enforcement or appeal of this final judgment order.

ENTER: APRIL 21, 1987

/s/ David J. Shields
Judge

No. 89-850

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROBERT G. CRONSON, AUDITOR GENERAL OF THE STATE OF ILLINOIS,

Petitioner,

vs.

CHICAGO BAR ASSOCIATION and CERTAIN INDIVIDUAL MEMBERS THEREOF, DAVID C. HILLIARD, THOMAS Z. HAYWARD, JR., JOHN D. HAYES, CYNTHIA CHASE, ROBERT L. PATTULLO, JR.; ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS; and STATE BOARD OF LAW EXAMINERS OF THE SUPREME COURT OF ILLINOIS,

Respondents.

BRIEF OF STATE BOARD OF LAW EXAMINERS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

WILLIAM J. HARTE
WILLIAM J. HARTE, LTD.
111 West Washington Street
Chicago, Illinois 60602
(312) 726-5015

Attorney for Respondent
STATE BOARD OF LAW EXAMINERS

Pioneer — 444 North Wabash Avenue — Chicago 60611 — 321-0223

QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner has demonstrated an interest protected under the due process clause of the Fourteenth Amendment?

2. If petitioner does have a protectable interest, whether his right to due process was denied because of alleged bias and prejudgment of the Illinois Supreme Court?

3. Whether the Rule of Necessity required the Illinois Supreme Court to deny petitioner's motion for recusal and substitution and to decide petitioner's case, despite petitioner's allegations of bias and prejudment?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

No. 89-850

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

ROBERT G. CRONSON, Auditor General
of the State of Illinois,

Petitioner,

vs.

CHICAGO BAR ASSOCIATION and CERTAIN INDIVIDUAL MEMBERS THEREOF, DAVID C. HILLIARD, THOMAS Z. HAYWARD, JR., JOHN D. HAYES, CYNTHIA CHASE, ROBERT L. PATTULLO, JR.; ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS, and STATE BOARD OF LAW EXAMINERS OF THE SUPREME COURT OF ILLINOIS,

Respondents.

BRIEF OF STATE BOARD OF LAW EXAMINERS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

Now comes respondent State Board of Law Examiners of the Supreme Court of Illinois

(the "Board"), by and through its counsel, William J. Harte, and submits this brief in opposition to the Petition For Writ of Certiorari of Robert G. Cronson, Auditor General of the State of Illinois ("petitioner"):

ADOPTION OF CO-RESPONDENT'S BRIEF IN OPPOSITION

The Board adopts the brief in opposition filed by respondent, Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois (the "Commission"), insofar as it is applicable to the Board, with the following additional remarks.

SUMMARY OF ARGUMENT

1. Petitioner has not demonstrated any liberty or property interest protected under

the due process provision of the Fourteenth Amendment.

2. Petitioner has not demonstrated any judicial bias, but in any event, no such bias which rises to a constitutional level.

3. The Rule of Necessity prevented the recusals of the four justices of the Illinois Supreme Court which petitioner sought below.

ARGUMENT

I.

PETITIONER DOES NOT HAVE A PROTECTABLE INTEREST.

Petitioner contends that he was denied a fair hearing on his Petition for Leave to Appeal before the Illinois Supreme Court and that his right to due process under the Fourteenth Amendment was thereby violated. As a prerequisite to claiming a violation of

his due process right, however, petitioner must demonstrate some liberty or property interest within the scope of due process protection. As the Court stated in Board of Regents v. Roth, 408 U.S. 564, 569-570 (1972):

> The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite.

In Leis v. Flynt, 439 U.S. 438, 441 (1979), the Court further explained that:

> ...the Constitution does not create property interests. Rather it extends various procedural safeguards to certain interests that stem from an independent source such as state law.

In this case, petitioner has failed to show

how his desire to audit the Board and the Commission rises to the level of an interest protected under the Fourteenth Amendment.

II.

PETITIONER HAS NOT PROVEN DISQUALIFYING BIAS.

Petitioner claims that unfairness resulted because his motion for the recusal of four Illinois Supreme Court Justices was denied and the Justices who were the subject of that motion participated in the decision denying his Petition for Leave to Appeal. Petitioner argues that due process required recusal of the four justices because of their bias and prejudgment of the issues involved in the controversy. Assuming that petitioner could demonstrate a protectable interest, his claim still fails because the bias he alleges does not rise to the level

of a constitutional violation.

This Court has repeatedly found that not all instances of alleged judicial bias present a constitutional issue. Recently, in Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 820 (1986), the Court stated:

> The Court has recognized that not "[a]ll questions of judicial disqualification... involve constitutional validity. Thus, matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion." Tumey v. Ohio, 273 U.S. 510, 523 (1927);...

In Lavoie, the Court also cited FTC v. Cement Institute, 333 U.S. 683 (1948), to reiterate its position that "most matters relating to judicial disqualification [do] not rise to a constitutional level." Lavoie, supra, 475 U.S. at 820. Against this background the Court has narrowly defined the

level of bias which constitutes a Fourteenth Amendment violation. In Tumey v. Ohio, 273 U.S. 510, 523 (1927), this Court stated that the type of bias which gives rise to a due process violation is "a direct, personal, substantial, pecuniary interest." Clearly, petitioner has failed to meet this standard.

Petitioner, however, contends that this Court has recognized due process violations in other situations involving questions of judicial bias. For instance, petitioner claims the situation in Ward v. Village of Monroeville, 409 U.S. 57 (1972), "does not differ significantly" from this case. He states that in Ward, "control of institutional funds by a governmental entity was held by this Court to be a disqualifying factor." (Pet. for Writ. of Cert., p. 18).

In fact, there is no similarity between the facts of Ward and the facts of this case. In Ward the Court found that a mayor with "executive responsibilities for village finances" was not an impartial judicial officer. The Court explained that the fines imposed by the "mayor's court" were a major part of village income. In Ward the Court identified the mayor's responsibility for generating village income from fines imposed by him in the "mayor's court" as the source of disqualifying bias. This decision did not establish a different standard; it is only a variation of the previously articulated "direct, personal, substantial and pecuniary" standard which applies in this case and which petitioner is unable to satisfy.

Petitioner also cites In Re Murchison,

349 U.S. 133, 136 (1955), as another instance where, although there was no direct pecuniary interest involved, the Court held that a disqualifying bias was present. Petitioner cites Murchison for the principle that "no man can be a judge in his own case." He argues that in this case this principle was violated because the Board and Commission are alter egos of the Illinois Supreme Court and that that court, in effect, sat in judgment in its own case. In Murchison, however, the principle was applied to a judge who sought to decide a case he had initiated. In Murchison, a judge who presided over a "one man judge-grand jury" brought contempt charges against two of the witnesses who appeared before him in the grand jury proceeding. The judge then sought to try the contempt charges

against the two. This Court stated that "[f]air trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer." Murchison, supra, 349 U.S. at 137. In Murchison, the intimate involvement in both the initiation and adjudication of a case illustrates the literal interpretation given by the Court to the maxim that "no man can be a judge in his own case." Unlike the judge in Murchison, the Illinois Supreme Court has been involved in this case in only a peripheral way. This case proceeded through the judicial system, where it was heard at the trial level and affirmed on appeal. The Illinois Supreme Court's connection with this case has been through the routine discharge of its administrative and supervisory responsibilities.

As a corollary to his general allegations of bias, petitioner claims that Justices Ward, Clark, Ryan and Moran should have been disqualified because they had prejudged the issues. In FTC v. Cement Institute, 333 U.S. 683 (1948), this Court considered whether prejudgment constitutes a type of disqualifying bias. In Cement Institute, although members of the Federal Trade Commission ("FTC") had apparently prejudged key issues involved in a case before the FTC, the Court found the FTC should not be disqualified from hearing the case. In reaching its decision, the Court stated:

> Neither the Tumey decision nor any other decision of this Court would require us to hold that it would be a violation of due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law.

Cement Institute, supra, 333 U.S. at 702-703. Further, the Court recognized that if the FTC were disqualified the matter in question would not have been acted upon by any governmental agency. In this case, as in Cement Institute, the alleged prejudgment petitioner complains of is not a basis for the disqualification of Justices Clark, Ward, Moran and Ryan and does not evidence a violation of petitioner's due process rights.

III.

THE RULE OF NECESSITY PREVENTS THE RECUSALS REQUESTED BY PETITIONER.

Even if petitioner had formulated a viable constitutional argument, the Rule of Necessity prevented the recusals sought by him. This Court has recognized that the Rule of Necessity precludes judicial disqualification where disqualification would

deny litigants a forum in which to pursue their claims. See United States v. Will, 449 U.S. 20 (1980).

In accordance with Will, and in recognition of the overriding importance of making a forum available to litigants, the Illinois Supreme Court properly found that the Rule of Necessity applied in this case. Citing several provisions of the Illinois Constitution, the Illinois Supreme Court found that the recusals and substitutions sought by petitioner were constitutionally prohibited. (See Order of Illinois Supreme Court, filed July 27, 1989, attached as Appendix A to petitioner's petition.) Under these circumstances the court found that the Rule of Necessity required it to decide petitioner's Petition for Leave to Appeal rather than to deprive his case of consider-

ation because of the alleged bias of four of its members.

In Will, the Court considered the Rule of Necessity in relation to a disqualification otherwise required by federal law. The Court has also referred to the principle in the context of disqualification required by due process. In Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986), the Court reviewed a constitutional claim based on the failure of the justices of the Alabama Supreme Court to recuse themselves because of alleged bias. The Court noted:

> ...[A]ccepting appellant's expansive contentions might require the disqualification of every judge in the State. If so, it is possible that under a 'rule of necessity' none of the judges or justices would be disqualified. See United States v. Will, 449 U.S. 200 (1980).

As in Lavoie, petitioner's allegations of bias prove too much. Petitioner contends the Supreme Court has "litigated its own case in lower courts through its own controlled agencies and employees" and that for eight years he has found himself "in the almost surreal position of waging a bout with the ultimate referee." (Pet. for Writ of Cert., p. 16). Petitioner, however, does not explain how the recusal and substitution of four justices could change this. As long as a relationship exists between the Supreme Court, the Board and the Commission, any proceedings before the Supreme Court will remain subject to the same allegations of unfairness and bias. Regardless of the make-up of the court, petitioner could still argue that the court was sitting in judgment of its own case and, under petitioner's

reasoning, any judge sitting (however temporarily) in the court would be subject to disqualification. In this situation, the Rule of Necessity precludes any disqualifications based on petitioner's allegations of bias.

CONCLUSION

For the reasons stated herein, and those stated in the brief in opposition filed by the Attorney Registration And Disciplinary Commission Of The Supreme Court of Illinois, the State Board of Law Examiners of the Supreme Court of Illinois requests that this court deny the petition for writ

of certiorari of Robert G. Cronson, Auditor General of the State of Illinois.

Respectfully submitted,

William J. Harte
WILLIAM J. HARTE, LTD.
111 West Washington Street
Chicago, IL 60602
(312) 726-5015

Attorney for Respondent
STATE BOARD OF LAW EXAMINERS

(3)

No. 89-850

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROBERT G. CRONSON, AUDITOR GENERAL OF THE STATE OF ILLINOIS,

Petitioner,

vs.

CHICAGO BAR ASSOCIATION and CERTAIN INDIVIDUAL MEMBERS THEREOF, DAVID C. HILLIARD, THOMAS Z. HAYWARD, JR., JOHN D. HAYES, CYNTHIA CHASE, ROBERT L. PATTULLO, JR.; ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS; and STATE BOARD OF LAW EXAMINERS OF THE SUPREME COURT OF ILLINOIS,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Illinois

BRIEF IN OPPOSITION OF RESPONDENT ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS

JOHN C. O'MALLEY
DEBORAH M. KENNEDY *
203 North Wabash Avenue
Suite 1900
Chicago, Illinois 60601
(312) 346-0690

Attorneys for Respondent

Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED

I. THE AUDITOR GENERAL LACKS STANDING AS HE IS NOT A PERSON UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

II. THE JUSTICES OF THE SUPREME COURT OF ILLINOIS CORRECTLY DETERMINED THAT RECUSAL WAS NOT NECESSARY.

III. THE ILLINOIS SUPREME COURT CORRECTLY INVOKED THE RULE OF NECESSITY WHERE RECUSAL WAS NOT WARRANTED AND SUBSTITUTION OF JUSTICES NOT AUTHORIZED BY THE ILLINOIS CONSTITUTION.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Illinois Constitution: Page:

Illinois Rules and Statutes

Other Authorities:

No. 89-850

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

ROBERT G. CRONSON, AUDITOR GENERAL
OF THE STATE OF ILLINOIS,

Petitioner,

vs.

CHICAGO BAR ASSOCIATION, ATTORNEY
REGISTRATION AND DISCIPLINARY COMMISSION
OF THE SUPREME COURT OF ILLINOIS,
and STATE BOARD OF LAW EXAMINERS OF
THE SUPREME COURT OF ILLINOIS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

RESPONDENT'S BRIEF IN OPPOSITION

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. CONSTITUTIONAL PROVISIONS

United States Constitution

(a) United States Constitution amend. XIV, § 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(b) United States Constitution amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal

case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Illinois Constitution

(a) Ill. Const. art. II § 1

Sec. 1. Separation of Powers

The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another.

(b) Ill. Const. art. VIII § 3(a)

Sec. 3. State Audit and Auditor General

(a) the General Assembly shall provide by law for the audit of the obligation, receipt and use of public funds of the State. The General Assembly, by a vote of three-fifths of the members elected to each house, shall appoint an Auditor General and may remove him for cause by a similar vote. The Auditor General shall serve for a term of ten years. His compensation shall be established by law and shall not be diminished, but may be increased, to take effect during his term.

(c) Ill. Const. art. VIII § 3(b)

Sec. 3. State Audit and Auditor General

(b) The Auditor General shall conduct the audit of public funds of the State. He shall make additional reports and investigations as directed by the General Assembly. He shall report his findings and recommendations to the General Assembly and to the Governor.

(d) Ill. Const. art. VIII § 1(a)

Sec. 1. FINANCE - General Provisions

(a) Public funds, property or credit shall be used only for public purposes.

2. ILLINOIS SUPREME COURT RULES

(a) Ill. Rev. Stat. ch. 110A § 751(1)

751(1) (Supreme Court Rule 751). Attorney Registration and Disciplinary Commission

(a) Authority of the Commission. The registration of, and disciplinary proceedings affecting, members of the Illinois bar shall be under the administrative supervision of an Attorney Registration and Disciplinary Commission.

(b) Ill. Rev. Stat. ch. 110A § 751(e)(5)

751. (Supreme Court Rule 751). Attorney Registration and Disciplinary Commission

(e) Duties. The Commission shall have the following duties:

(5) to collect and administer the disciplinary fund provided for in Rule 755, and, on or before April 30 of each year, file with the court an accounting of the monies received and expended for disciplinary activities and a report of such activities for the previous calendar year. Such accounting and report shall be an independent annual audit of the disciplinary fund as directed by the court.

(c) Ill. Rev. Stat. ch. 110A § 752

752. (Supreme Court Rule 752). Administrator.

The Commission will appoint an Administrator of the registration and disciplinary system to serve at its pleasure as the principal executive officer of the registration and disciplinary system.

(d) Ill. Rev. Stat. ch. 110A § 753

753. (Supreme Court Rule 753). Inquiry, Hearing and Review Boards

(a) Inquiry Boards.

(2) The Board shall inquire into and investigate matters referred to it by the Administrator. The Board may also initiate investigations on its own motion and may refer matters to the Administrator for investigation.

(b) Filing a Complaint. A complaint voted by the Inquiry Board shall be prepared by the Administrator and filed with the Hearing Board. The complaint shall reasonably inform the attorney of the acts of misconduct he is alleged to have committed.

(c) Hearing Board.

(3) The hearing panels shall conduct hearings on complaints filed with the Board and on petitions referred to the Board. The panel shall make findings of fact and conclusions of fact and law, together with a recommendation for discipline, dismissal of the complaint or petition, or nondisciplinary suspension.

(5) Proceedings before the Board shall be conducted according to the practice in civil cases as modified by rules promulgated by the Commission pursuant to Rule 851(a).

(6) Except as other expressly provided in these rules, the standard of proof in all hearings shall be clear and convincing evidence.

(d) Review Board. There shall be a nine-member Review Board which shall be appointed by the court...

(e) Review Procedure.

(1) Reports of the Hearing Board shall be reviewed by the Review Board upon the filing of exceptions by either party.

(2) The parties shall not be entitled to oral argument before the Review Board as of right, but the Board may, in its discretion, permit or require briefs or oral arguments or both.

(3) The Review Board may approve the findings of the Hearing Board, may reject or modify such findings as it determines are not established by clear and convincing evidence, may make such additional findings as are established by clear and convincing evidence,...or may approve, refect or modify the recommendations, may dismiss the proceeding...

(6) The Administrator may petition the court for leave to file exceptions to the order or report of the Review Board.

(7) The parties shall not be entitled to oral argument before the court as of right, but the court may, in its discretion, permit or require briefs or oral argument or both...

(e) Ill. Rev. Stat. ch. 110A § 756.

756. (Supreme Court Rule 756. Registration and Fees.

(a) Annual Registration Required. Except as hereinafter provided, every attorney admitted to practice law in this State shall register and pay an annual registration fee to the Commission on or before the first day of January.

3. RELEVANT ILLINOIS STATUTORY PROVISIONS

(a) Ill. Rev. Stat. ch. 85 § 901 (1973)

Sec. 901. "Public funds" and "public agency" defined

The words "public funds", as used in this Act, mean current operational funds, special funds, interest and sinking funds, and funds of any kind or character belonging to or in the custody of any public agency.

The words "public agency", as used in Act, mean the State of Illinois, the various counties, townships, cities, towns, villages, school districts, special road districts, public water supply districts, fire protection districts, drainage districts, levee districts, sewer districts, housing authorities, and all other political corporations or subdivisions of the State of Illinois, now or hereafter created, whether herein specifically mentioned or not.

(b) Ill. Rev. Stat. ch. 15 § 301-7

STATE AUDITING ACT
Article VIII. General Provisions

301-7. State agencies

Sec. 1-7. "State agencies" means all officers, boards, commissions and agencies created by the Constitution, whether in the executive, legislative or judicial branch, but other than the circuit court; all officers, departments, boards, commissions, agencies, institutions, authorities, universities, bodies politic and corporate of the State; and administrative units or corporate outgrowths of the State government which are created by or pursuant to statute, other than units of local government and their offices, school districts and boards of election commissioners; all administrative units and corporate outgrowths of the above and as may be created by executive order of the Governor.

(c) Ill. Rev. Stat. ch. 15 § 301-2

301-2. Purpose and construction
Sec. 1-2. Purpose and construction

(a) This Act implements Article VIII, Section 3 of the Constitution , and shall be construed in furtherance of those provisions.

(b) This Act is intended to provide a comprehensive and thorough post audit of the obligation, expenditure, receipt

and use of public funds of the State under the direction and control of the Auditor General...

(c) This Act is intended to govern the Auditor General under the control and direction of the General Assembly. Neither the enactment of this Act nor any provision contained herein shall in any way derogate from the status of the Auditor General as a legislative officer of the State under the Constitution.

(d) Ill. Rev. Stat. ch. 15 § 301-13(c)

301-13. Financial audit or compliance audit

(a) whether the audited agency has obligated, expended, received and used public funds of the State in accordance with the purpose for which such funds have been appropriated or otherwise authorized by law;

(b) whether the audited agency has obligated, expended, received and used public funds of the State in accordance with any limitations, restrictions, conditions or mandatory directions imposed by law upon such obligation, expenditure, receipt or use;

(e) in the case of a local or private agency, whether the records, books and accounts of the audited agency fairly and accurately reflect its financial and fiscal operations relating to the obligation, receipt,

expenditures and use of public funds of the State to the extent such operations must be reviewed to complete post audit determinations under paragraphs (a) and (b) of this Section.

(e) Ill. Rev. Stat. ch. 15 § 303-1

AUDIT OF PUBLIC FUNDS 303-1. Jurisdiction of Auditor General

Sec. 3-1. Jurisdiction of Auditor General.

The Auditor General has jurisdiction over all State agencies to make post audits and investigations authorized by or under this Act or the Constitution.

(f) Ill. Rev. Stat. ch. 15 § 303-14

AUDIT OF PUBLIC FUNDS 303-14. Audit reports.

Sec. 3-14. Audit reports. Upon completion of any audit the Auditor General shall issue an audit report...

As part of this report the Auditor General shall prepare a signed digest of the legislatively significant matters of the report and, as may be applicable, a concise statement of (1) any actions taken or contemplated by persons or agencies subsequent to the completion of the audit but prior to the release of the report, which bear on matters in the report, (2) any actions the Auditor General considers

necessary or desirable, and (3) any other information the Auditor General deems useful to the General Assembly in order to understand or act on any matters presented in the audit.

The Auditor General shall submit a copy of each audit report to the Commission, the Governor, the Speaker and minority leader of the House of Representatives and the President and minority leader of the Senate...

(g) Ill. Rev. Stat. ch. 130 §7

Sec. 7. Treasurer to keep revenues, etc.

The State Treasurer shall receive the revenues and all other public moneys of the state, and all moneys authorized by law to be paid to him, and safely keep the same.

INTRODUCTION

For the sake of brevity, Respondent will not include sections in this brief for opinion below and jurisdiction. Respondent will address in Argument those portions of Petitioner's brief which Respondent considers inaccurate or inadequate.

STATEMENT OF THE CASE

Commencing in 1977, the Illinois Auditor General sought to perform an audit of the receipt and use of the funds administered by the Illinois Attorney Registration and Disciplinary Commission ("Commission") and State Board of Law Examiners ("Board"). The Auditor General has taken the position that the Commission and Board are state agencies and that the funds administered by each are public funds. The Commission and Board have determined that the Auditor

General has no authority to conduct any such audit as the Commission and Board are not state agencies and the funds administered by them are not public funds.

On July 26, 1982, the Chicago Bar Association filed in the Circuit Court of Cook County a complaint for declaratory relief against the Illinois Auditor General, the Commission and the Board seeking a declaration that the Illinois Constitution and applicable statutes do not authorize the Auditor General to conduct any audit of the funds of the Commission or Board. On May 4, 1984, the Commission and the Board were realigned as plaintiffs.[1]

---

1 Petitioner's reckless reference to the reassignment of Judge Murray by the Supreme Court of Illinois is not only without factual basis but an affront to the Judiciary. Such statements typify the grandiose positions and arguments put forth below by Petitioner and warrant no consideration by this Court.

On April 21, 1987, the trial court issued its judgment order granting the plaintiff-appellees' motions for summary judgment and finding that the Auditor has no authority to audit as whether neither the Board nor Commission are state agencies in receipt of public funds.

On May 18, 1987, the Auditor filed a motion for reconsideration which was denied on July 17, 1987, and thereafter, filed his notice of appeal.

On May 18, 1989, the Appellate Court of Illinois, First Judicial District entered its judgment against Appellant-Petitioner. No party to the proceedings filed a petition for rehearing. Petitioner filed a petition for a Certificate of Importance in the Appellate Court on June 1, 1989.

On June 1, 1989, a Petition for Leave to Appeal was filed concurrently with a Verified Motion to Recuse and

Appoint Substitute Justices by Petitioner, in the Illinois Supreme Court. On July 27, 1989, the Illinois Supreme Court denied Petitioner's motion and petition.

On August 18, 1989, Petitioner filed a Petition for Rehearing and Reconsideration of Order Denying Verified Motion to Recuse and to Appoint Substitute Justices for this Cause and a Motion for Leave to Petition for Rehearing and Reconsideration of Order Denying Petition for Leave to Appeal (with suggestions conditionally attached). On August 29, 1989, the Illinois Supreme Court denied the petition for rehearing.

On November 27, 1989, Petitioner filed his Petition for Writ of Certiorari to the Illinois Supreme Court with the Clerk of the United States Supreme Court.

On November 27, 1989, Petitioner served Respondent with copies of his Petition for Writ of Certiorari filed with the Supreme Court of the United States.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari to the Supreme Court of Illinois should be denied for the following reasons:

First, Petitioner lacks standing as he is not a person under the Fourteenth Amendment to the United States Constitution. The term "person" within the Fourteenth Amendment does not include a state or one of its officials. Further, neither the Petitioner nor the Illinois taxpayers have an personal stake in the outcome of this matter, because the funds at issue below are not public monies. Therefore, Petitioner lacks

standing to maintain this action.

Second, the Justices of the Supreme Court of Illinois correctly determined that recusal was not warranted. The Petitioner has failed to demonstrate that recusal was necessary. Neither the Constitution, the Illinois Cannons of Judicial Conduct, nor the Illinois Code of Civil Procedure required the recusal of any Illinois Supreme Court Justice. Thus, the Petitioner's rights under the Fourteenth Amendment were not violated by the denial of his motion for recusal.

Finally, the Illinois Supreme Court correctly invoked the Rule of Necessity. Recusal was not warranted in the matter below. The Illinois Constitution makes no provision for the substitution of temporary justices to the Supreme Court of Illinois. Therefore, Petitioner's rights under the Fourteenth Amendment were not denied where the Supreme Court

of Illinois invoked the Rule of Necessity.

ARGUMENT

I

THE AUDITOR GENERAL LACKS STANDING AS HE IS NOT A PERSON UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The Auditor General lacks standing to pursue his claim of a violation of due process rights. The term "person" within the Fourteenth Amendment to the United States Constitution does not include a state or one of its officials.

Petitioner's claim as set forth in footnote 10 of his petition, as to his standing to maintain this action must be rejected. The Auditor General has throughout this controversy acted, at all times, in his capacity as a legislative agent, not as a private citizen. As Petitioner stated, his authority as a legislative agent with respect to the

funds of the Attorney Registration and Disciplinary Commission and the State Board of Law Examiners has been determined conclusively below, and is not now at issue.

The Fourteenth Amendment to the United States Constitution mandates that no state shall "...deprive any person of life, liberty, or property without due process of law...." U.S. Const. amend. XIV, § 1. Whether the word "person" includes a state is dependent upon statutory construction and the environment in which the legislation was enacted and in common usage does not include a sovereign. Statutes employing the word "person" generally are contrued to exclude a sovereign. Will v. Michigan Department of State Police, 109 S.Ct. 2304, 2308 (1989); Wilson v. Omaha Indian Tribe, 442 U.S. 653, 667 (1979).

This Court has stated: "...The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." Shelley v. Kraemer, 334 U.S. 1 (1948). Clearly, the state is not a person within the scope of the protection of the Fourteenth Amendment. E.g., State of Wisconsin v. Zimmerman, 205 F.Supp. 673 (W.D. Wis. 1962).

It is the general rule that state officials acting within the scope of their official capacity do not have standing to maintain an action under the Fourteenth Amendment to the United States Constitution. E.g., Baxley v. Rutland, 409 F.Supp. 1249 (M.D. Ala. 1976); cf. Comment, An Attorney General's Standing Before The Supreme Court To Attack The Constitutionality of Legislation, 26 U.Chi.L.Rev. 624 (1959).

In Baxley, the Attorney General of Alabama, in his official capacity and as a relator of the state, attacked a state statute on the grounds that the statute violated the Fourteenth Amendment to the United States Constitution. Baxley, 409 F.Supp. 1249, 1250 (M.D. Ala. 1976). There, the Attorney General alleged that he was suing for the benefit of private persons, citizens, students, parents, and guardians. Baxley, 409 F.Supp. 1249, 1257 (M.D. Ala. 1976). The Court dismissed the action finding that the Attorney General lacked standing and the Court stated that it was incongruous for a state or state official to attack the validity of an enactment of its own legislature. Id.; cf. Yonkers Commission on Human Rights v. City of Yonkers, 654 F.Supp. 544, 553 (S.D. NY 1987) (a department which is an arm or agency of a unit of state government is not protected

by the Fourteenth Amendment against the acts of the state or other entities exercising state delegated authority).

While this Court has not directly determined whether a state is a "person" under the Fourteenth Amendment, it has held that a state is not a person under the language of the Due Process Clause of the Fifth Amendment of the United States Constitution. South Carolina v. Katzenbach, 383 U.S. 301 (1966). In Katzenbach, this Court rejected a claim by the state that the Due Process Clause of the Fifth Amendment extended to it under a claim of infringement arising out of the Voting Rights Act of 1965. Katzenbach, 383 U.S. 301, 324 (1966). There, this Court noted that "the word 'person' in the context of the due process clause of the Fifth Amendment cannot, by any reasonable mode of

interpretation, be expanded to encompass the States of the Union...." Katzenbach, 383 U.S. 301, 324 (1966).

Similarly, this Court has rejected the claim that the word "person" found in chapter 42 of the United States Code Section 1983, included the state. Will v. Michigan Department of State Police, 109 S.Ct. 2304, 2308-2309 (1989). This Court, in rejecting the claim, concluded that petitioner's construction of section 1983 "...as a remedy for official violations of federally protected rights, does no more than confirm that the section is directed against state action.... It does not suggest that the state itself was a person that Congress intended to subject to liability." Will, 109 S.Ct. 2304, 2310 (1989).

In Baker v. Carr, 369 U.S. 186 (1962), this Court stated that the gist of the question of standing was whether

"...the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions...." 369 U.S. 186, 204 (1962). The focus is "on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated...." Id.

Petitioner incorrectly argues, in footnote 10 of his Petition, that he has jus tertii standing to litigate on behalf of Illinois taxpayers regarding the "use of public moneys," under Article VIII, § 3 of the Illinois Constitution. Petitioner's argument must fail. To satisfy requirements of standing as a taxpayer, the taxpayer must show that he

has a personal stake in the outcome of the litigation. Frothingham v. Mellon, 262 U.S. 447 (1923).

Petitioner incorrectly cites Flast v. Cohen, 392 U.S. 83 (1968), in support of his jus tertii standing argument. In Flast, the taxpayers were granted standing to challenge the use of federal funds generated by tax monies. Flast, 392 U.S. 83, 85 (1968). There, the Court noted that each of the seven appellants had as a common attribute that "each pay[s] income taxes of the United States." Flast, 392 U.S. 83, 85 (1968). Such is not the case in this matter.

The nature of the funds of the Attorney Registration and Disciplinary Commission and the State Board of Legal Examiners was determined conclusively below not to be "public moneys." The taxpayers have no personal stake in the

funds, as "public moneys." Thus, Petitioner's claim must be rejected for lack of standing.

Moreover, Petitioner incorrectly cites Coleman v. Miller, 307 U.S. 433 (1939), for the proposition that Petitioner has an adequate stake in this matter by virtue of his duty to enforce state enactments. Petition at 11, n.10. In Coleman, this Court granted standing to public officials to challenge a state statute "the validity of which has been drawn in question." Coleman, 307 U.S. 433, 445 (1939)(emphasis added). Here, the validity of no statute is being questioned. Rather, the mere application of the statute was at issue below.

There can be no claim of denial of due process, either substantive or procedural, absent deprivation of either a liberty or property right. Eichman v. Indiana State University Board of

Trustees, 597 F.2d 1104 (7th Cir. 1979); Mensik v. Smith, 18 Ill.2d 572 , 166 N.E.2d 265 (1960). Tax and regulatory powers have been found not to be compensable property rights, but rather mere expectations. City of Saulte St. Marie, Mich. v. Andrus, 532 F.Supp. 157, 168 (D.C. 1980) (city, which is created by state legislature, is not "person" under the Fifth Amendment).

Petitioner has neither a personal stake nor a property interest in the outcome of this matter. The funds that were at issue in the proceeding are generated by attorneys' fees, not tax dollars. As such, Petitioner has no personal stake in this matter. Thus, Petitioner lacks standing to maintain this action.

II
THE JUSTICES OF THE SUPREME COURT OF ILLINOIS CORRECTLY DETERMINED THAT RECUSAL WAS NOT WARRANTED

The Auditor General's motion for recusal of four of the Justices of the Illinois Supreme Court was properly denied. Contrary to his argument, the Auditor General's rights under the due process clause of the Fourteenth Amendment to the United States Constitution have not been violated by previous decisions of the Supreme Court of Illinois related to his authority. See: Madden v. Cronson, 114 Ill.2d 504, 501 N.E.2d 1267 (1986), cert. denied, 484 U.S. 818 (1987).

Likewise, the Auditor General has failed to demonstrate any prejudgment of the issues by any Justice of the Illinois Supreme Court or prejudice towards him by that court which would necessitate recusal. Neither the Constitution, the

Illinois Cannons of Judicial Conduct, nor the Illinois Code of Civil Procedure required any Justice of the Illinois Supreme Court to recuse himself from the matter below.

It is presumed that "the law will not suppose a possibility of fear or favor in a judge who is already sworn to administer impartial justice and whose authority greatly depends upon that presumption and idea." Aetna Life Insurance Company v. Lavoie, 475 U.S. 813, 820 (1986)(citing 3 W. Blackstone Commentaries (361)).

Statements by judicial officers which purport to show possible prejudgment of the issues, without some showing of additional interests, do not rise to the level of an infringement of due process rights. In fact, rarely do issues related to judicial disqualification, such as personal biases

or prejudices toward a party, rise to a constitutional level. Federal Trade Comm. v. Cement Institute, 333 U.S. 683, 702-703, rehearing denied, 334 U.S. 839 (1948). Aetna Life Insurance Company v. Lavoie, 475 U.S. 813 (1986).

Fundamental constitutional rights arising out of the Fourteenth Amendment cannot be violated by alleged prejudgment unless a judge has direct, personal, substantial and pecuniary interest in the pending matter. Aetna v. Lavoie, 106 S.Ct. 1580, 1586-88. While the Auditor recognizes that no such interest exists which could give rise to a violation of his due process rights, he suggests that the court extend the requirement of disqualification to a new area of "institutional interests." This case does not warrant such an extension and indeed the Auditor has not set forth any facts upon which such an extension should be

considered.

While the Auditor asserts that both the statements made by individual Justices and the dispositions reached by the Court in Cronson v. Attorney Registration and Disciplinary Commission, No. 57179 and in Madden v. Cronson, 114 Ill.2d 504, 561 N.E.2d 1267 (1986), cert. denied, 484 U.S. 818 (1987), support his theory of institutional interests and demonstrate prejudgment and prejudice, he has failed to put forth any specific evidence substantiating his assertions.

In Madden v. Cronson, supra, the Court specifically refrained from expressing any opinion as to whether the Auditor could audit the funds of the Commission and Board, noting the pendency of this matter. Likewise, the statements attributed to individual Justices in the Auditor's petition, do not express personal opinions, but merely express the

position of the Court in the exercise of its inherent authority to regulate the profession.

Nonetheless, entry of an adverse decision, standing alone, is not sufficient evidence to demonstrate prejudice necessitating recusal of a judge. Nehring v. First National Bank in DeKalb, 143 Ill.App.3d 791, 493 N.E.2d 1119, 1130 (2nd Dist. 1986)(referring to, City of Chicago v. Walker, 61 Ill.App.3d 1050, 1054, 377 N.E.2d 1214, 1217 (1st Dist. 1978)). Nor can facts learned by a judge in his judicial capacity be the basis for disqualification. United States v. Patrick, 542 F.2d 381 (7th Cir. 1976) (referring to, 287 U.S.C.A. § 455(b)(1) (1978)).

III

THE ILLINOIS SUPREME COURT CORRECTLY INVOKED THE RULE OF NECESSITY WHERE RECUSAL WAS NOT WARRANTED AND SUBSTITUTION OF JUSTICES IS NOT AUTHORIZED BY THE ILLINOIS CONSTITUTION

Petitioner asks this Court to readdress the standard for the Rule of Necessity previously articulated by this Court. This Court has recently stated that a judge has an absolute duty to hear and decide a matter, even if he has an interest, where no provision is made for substitution. United States v. Will, 449 U.S. 200 (1980).

In Will, this Court held that the court had properly chosen not to disqualify itself by invoking the Rule of Necessity, even where its decision directly benefited each member of the Court. Will, 449 U.S. 200, 217 (1980). There, this Court, refusing to alter the time-honored Rule of Necessity, stated that:

> [A] Court must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them.

Will, 449 U.S. 200, 216 (1980) (quoting Cohens v. Virginia, 6 Wheat. 264 (1821).

Petitioner incorrectly suggests that the Illinois Supreme Court was foreclosed from invoking the Rule of Necessity, because the Court was authorized to substitute justices. First, this assertion assumes that the justices were disqualified. Petitioner has made no

showing that the Court itself had a direct and substantial interest in the outcome of the litigation or that recusal was warranted.

Second, to deny jurisdiction based on the Rule of Necessity, some provision must be available to substitute a judge. Will, 449 U.S. 200, 214 (1980). As in Will, the Illinois Supreme Court, by necessity, had a duty to decide the matter before it. The authority to assign justices does not extend to the Supreme Court of Illinois when there is a full compliment of sitting justices. Perlman v. First National Bank of Chicago, 60 Ill.2d 529, 331 N.E.2d 65 (1975). Nor does the Illinois Constitution authorize the Supreme Court of Illinois to freely assign justices to replace temporarily recused justices. Ill.Const. Art. VI, § 16. Moreover, the Illinois Constitution makes no

provision for substituting a majority of the Court with other judges. Ill.Const. Art. VI, § 16. Consequently, if the Illinois Supreme Court had not invoked the Rule of Necessity, Petitioner would have been denied his constitutional right to have his matter adjudicated. Will, 499 U.S. 200, 217 (1980).

Finally, the Petitioner's request that substitute Justices be appointed is inconsistent with the decisions of the Illinois Supreme Court. Perlman v. First National Bank of Chicago, 60 Ill.2d 529, 331 N.E.2d 65 (1975). Where recusal has occurred and the constitutional requirement of four concurrances is an impossibility, the Appellate Court decision becomes the conclusive adjudication of the case but no precedential value then attaches. Perlman, 331 N.E.2d at 66.

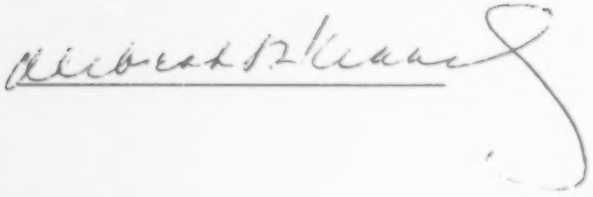
CONCLUSION

Petitioner has previously asserted his construction of the state constitution in an appropriate forum. His construction did not prevail. He now seeks to bootstrap his claim into federal court by arguing that he is acting as both a private citizen and a state official. The relief sought by Petitioner would create a forum by which state officials could challenge state legislative and constitutional schemes with which they do not agree. Such precedent would be overburdensome, unwarranted and is not a remedy envisioned by the United States Constitution or the Fourteenth Amendment to the Constitution.

For the reasons set forth above, Respondent, Attorney Registration and

Disciplinary Commission respectfully submits that the Petition for Writ of Certiorari be denied.

Respectfully submitted,



Deborah M. Kennedy
203 North Wabash Avenue
Suite 1900
Chicago, Illinois 60601
(312) 346-0690

Attorney for Respondent

Dana Cook Baer, J.D., DePaul University College of Law, assisted in the preparation of this brief.

No. 89-850

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROBERT G. CRONSON, AUDITOR GENERAL OF THE STATE OF ILLINOIS,

Petitioner,

vs.

CHICAGO BAR ASSOCIATION and CERTAIN INDIVIDUAL MEMBERS THEREOF, DAVID C. HILLIARD, THOMAS Z. HAYWARD, JR., JOHN D. HAYES, CYNTHIA CHASE, ROBERT L. PATTULLO, JR.; ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS; and STATE BOARD OF LAW EXAMINERS OF THE SUPREME COURT OF ILLINOIS,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Illinois

BRIEF IN OPPOSITION OF RESPONDENTS THE CHICAGO BAR ASSOCIATION, DAVID C. HILLIARD, THOMAS Z. HAYWARD, JR., JOHN D. HAYES, CYNTHIA CHASE AND ROBERT L. PATTULLO, JR.

JOHN F. McCARTHY
Counsel of Record
ROBERT E. LEVIN
ROSEANN OLIVER
100 West Monroe Street
Chicago, Illinois 60603
(312) 263-1155

Attorneys for said Respondents

Of Counsel:
McCARTHY AND LEVIN

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED FOR REVIEW

These Respondents submit that this matter does not present any violation of the Due Process Clause of the United States Constitution. The Petitioner, Cronson, received a fair hearing on his Petition For Leave To Appeal to the Illinois Supreme Court.

This is the only question raised by the Petition for Certiorari. Cronson does not question the Illinois Supreme Court's denial of the Petition For Leave To Appeal on the matter of the Illinois Appellate Court's decision or the Trial Court's Judgment that monies paid by applicants and lawyers to the Board of Law Examiners and the Attorney Registration and Disciplinary Commission are not public funds and are not subject to audit by Cronson.

PARTIES TO THE PROCEEDING

Cronson fails to mention that David C. Hilliard, Thomas Z. Hayward, Jr., John D. Hayes, Cynthia Chase and Robert L. Pattullo, Jr. are respondents. Hilliard, Hayward and Hayes are attorneys practicing law in Chicago and were officers of The Chicago Bar Association (CBA) at the time this proceeding was commenced in the Circuit Court. Chase and Pattullo were applicants for admission to the Illinois Bar when this suit was commenced and are practicing attorneys in Chicago at this time. CBA is the largest urban bar association in this Country with approximately 20,000 members.

Indeed, throughout his Petition to this Court, Cronson treats this matter as litigation between the State Board of Law Examiners and the Attorney Registration and Disciplinary Commission, as agents of the Illinois Supreme Court, and himself, as Auditor General. CBA and the five respondents just named, the original plaintiffs, certainly cannot be regarded as agents of the Illinois Supreme Court and subject to its control.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 89-850

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROBERT G. CRONSON, AUDITOR GENERAL OF THE STATE OF ILLINOIS,

Petitioner,

vs.

CHICAGO BAR ASSOCIATION and CERTAIN INDIVIDUAL MEMBERS THEREOF, DAVID C. HILLIARD, THOMAS Z. HAYWARD, JR., JOHN D. HAYES, CYNTHIA CHASE, ROBERT L. PATTULLO, JR.; ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS; and STATE BOARD OF LAW EXAMINERS OF THE SUPREME COURT OF ILLINOIS,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF IN OPPOSITION OF RESPONDENTS THE CHICAGO BAR ASSOCIATION, DAVID C. HILLIARD, THOMAS Z. HAYWARD, JR., JOHN D. HAYES, CYNTHIA CHASE AND ROBERT L. PATTULLO, JR.

STATEMENT OF THE CASE—FACTS

There is not any dispute about the facts of this case. However, certain matters should be emphasized.

Under Rules of the Illinois Supreme Court, the Board of Law Examiners and the Attorney Registration and Disciplinary Commission are required to make and submit to the Court annual audits,—Rules 702(d) and 751(e)(b). Each agency has retained CPAs to comply with that requirement, Petition for Cert. 7. The Court has offered to make a copy of those audits available to Cronson,—letter of Chief Justice Ward to Cronson, Exhibit 2 in support of Cronson's Motion for Summary Judgment.

The financial and compliance audit which Cronson seeks to do is governed by the Audit Guide of Cronson for Performing Compliance Audits of Illinois State Agencies, dated March 15, 1985, R. 1303, Exhibit 53. That Guide has 216 single spaced pages. It provides for every possible detail which the Auditors should consider. The following paragraph from the Audit Guide sets forth the scope of the Auditors' activities, R. 1303, Exhibit 53, p. 13.

> Auditors are to be actively alert for opportunities to extend their compliance examinations into areas that normally would be considered efficiency, economy or program auditing, whenever situations arise during the ordinary course of the compliance audit which reveal the need for improvements of this type. It is the responsibility of compliance auditors to make recommendation regarding efficiency of operations and effectiveness of programs when they find needed improvements of this nature during the conduct of their compliance audit. Further, as set forth in Chapter 26, auditors are to make observations regarding auditee performance in several specific areas of management activity and be prepared to offer comments if requested by the Auditor General's Office.

Cronson testified to the breadth of an audit. He stated that "when the people making the audit arrive at the office or agency to be audited, . . . part of the records that they seek— . . . include the files of the agency", Report

of Proceedings, p. 140. "One of the guidelines or criteria of an audit under the supervision of your (Cronson's) office is that the files are open to you", Report of Proceedings, pp. 174-175 (parenthesis added).

Cronson also has been quoted as saying that the project (of the audit of the Board and Commission) would take at least six months to complete; see Chicago Daily Law Bulletin, May 30, 1980. And in an article in St. Louis Globe Democrat of October 20, 1977, Alfred H. Greening, Jr., General Counsel for Cronson's Office, is quoted as saying that the two agencies' (the Board and Commission) method of raising revenue is "invading the province of the legislature" which has sole authority for collecting revenue under the 1970 Illinois Constitution, Report of Proceedings, pp. 154, *et seq.* CBA Exhibits 1 and 2 (parenthesis added).

SUMMARY OF ARGUMENT

Cronson has presented only one argument in support of his contention that he was denied "due process" by the Illinois Supreme Court. That is that four of the Justices,—Clark, Moran, Ryan and Ward (a Majority of the Court),—were disqualified.

This Court's standard for disqualification is that a judge must have an interest in the outcome which is "direct, personal, substantial and pecuniary". None of the four Justices had such an interest. Thus Cronson's argument fails and his Petition for Certiorari should be denied. Additionally, Cronson already had received a fair hearing before the Trial Judge and the Illinois Appellate Court.

ARGUMENT

THE FOUR JUSTICES OF THE ILLINOIS SUPREME COURT,—CLARK, MORAN, RYAN AND WARD,—WERE NOT SUBJECT TO DISQUALIFICATION AND RECUSAL.

This Court has considered the matter of disqualification of judges on several occasions. In its decision in *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), speaking through Mr. Justice Brennan, this Court said, p. 60:

> This Court held that "it certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a *direct, personal, substantial, pecuniary interest* in reaching a conclusion against him in his case."

Later, in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), through Chief Justice Burger, this Court repeated, pp. 821-822:

> In Tumey, while recognizing that the Constitution does not reach every issue of Judicial qualification, the Court concluded that "it certainly violates the Fourteenth Amendment . . . to subject (a person's) liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case."

and later, this Court continued, 475 U.S. 824:

> We also hold that his interest was " 'direct, personal, substantial, (and) pecuniary.' "

In *Madden, Acting Administrator v. Cronson, Auditor General*, 114 Ill. 2d 504, 501 N.E. 2d 1267 (1986), a related case, Cronson raised the same issues and the Illi-

nois Supreme Court followed the foregoing decisions. This Court denied certiorari, 484 U.S. 818 (1987).

That was an original suit for *Mandamus* to require Cronson to audit funds appropriated by the General Assembly to the Court for operation of the Court System. It excluded the records and monies of the Board and the Commission. In that matter, Cronson filed a special and limited appearance and motion to dismiss "for want of jurisdiction based on due process grounds". He contended that the Illinois Supreme Court was disqualified and lacked jurisdiction because "it would be trying its own case in violation of his due process rights" and because it had "prejudged, adversely to him, an issue of his auditing authority which is inseparably related to the issue in this cause" (the *Mandamus*). The Illinois Supreme Court denied that Motion.

Cronson did not file any further motion or response. Neither he nor his counsel appeared for oral argument. The Illinois Supreme Court ordered the issuance of the writ. This Court denied certiorari, 484 U.S. 818.

In its opinion, the Illinois Supreme Court discussed Cronson's motion to dismiss "for want of jurisdiction based on due process grounds". The Court said, 114 Ill. 2d 504, 501 N.E. 2d 1267, 1271:

> Although not previously presented to this court, the Supreme Court in recent years has, on several occasions, considered the question of the nature and extent of the interest required to render a judge's failure to recuse himself a violation of due process. (Aetna Life Insurance Co. v. Lavoie (1986), ___ U.S. ____, 89 L. Ed. 2d 823, 106 S. Ct. 1580.) The rule distilled from the opinions is that the interest is violative of due process if it is "direct, personal, substantial, (and) pecuniary." (Ward v. Village of Monroe-

> ville (1972), 409 U.S. 57, 60, 34 L. Ed. 2d 267, 270, 93 S. Ct. 80, 83.) Applying either that test or the less stringent one advocated by Mr. Justice Brennan in his concurring opinion in Aetna Life Insurance Co. v. Lavoie, we hold that the judges of this court do not have an interest sufficiently direct or substantial so that their participation in the decision of this case is violative of due process.
>
> The decision of the court to direct the Board and Commission to refuse to permit defendant to audit their respective accounts, upon which defendant's assertions of "prejudgment" and "bias" were based, was made in the course of the court's exercise of its authority to regulate the admission and discipline of the bar, and not as a decision in pending litigation. That decision, unlike the decision in United States v. Will (1980), 449 U.S. 200, 66 L. Ed. 2d 392, 101 S. Ct. 471, has no pecuniary effect on the individual justices of this court, and we are not persuaded that any member of the court, if the relevant authorities indicate otherwise, feels compelled to reach the same conclusion in a judicial proceeding as that reached in a prior administrative decision.

During the pendency of the *Mandamus* proceeding, Cronson filed, in the United States District Court in Springfield, Illinois, a proceeding for an injunction against the Justices of the Illinois Supreme Court, Madden and the Clerk of the Court to restrain further action in the *Mandamus* matter. The District Judge denied the Motion for an injunction and later dismissed the suit. The Federal Court of Appeals affirmed and this Court denied *certiorari*, 645 F. Supp. 793, 810 F.2d 662, *cert. denied*, 484 U.S. 871 (1987). In its opinion, the Court of Appeals, through Mr. Justice Posner, said:

> Although the appeal is not moot, the case is so clearly outside the cognizance of the federal courts that

> no purpose would be served by setting the appeal for argument in the ordinary course. This is not to say that Cronson's position has no merit as a matter of state law; that is a question on which we express no view. His dispute simply has no place in a federal court.

On consideration of the foregoing authorities, Clark, Moran, Ryan and Ward were not subject to disqualification and recusal. Cronson's due process arguments fail.

Of persuasion to the Illinois Supreme Court may have been its earlier opinion in *Barco Manufacturing Company v. Wright*, 10 Ill. 2d 157, 139 N.E. 2d 227 (1956). That case involved contributions under the Illinois Unemployment Compensation Act by employers with the State Treasurer. He deposited them with the United Sates Treasury until they were requisitioned for payment of benefits to unemployed workers. The Illinois Supreme court decided that the contributions were not "public funds" but "trust funds". It emphasized that the monies in question were not those raised by taxation and deposited in the general revenue or similar fund for disbursement by appropriation of the General Assembly.

Cronson argues that the Illinois Supreme Court improperly used the Rule of Necessity, Petition for Certiorari, 21, 24. This is a misconception. We repeat what that Court said in *Madden, supra*, 114 Ill. 2d 504, 501 N.E. 2d 1267.

> If there were any merit to defendant's contention, we would be required to consider the applicability of the common law rule of necessity. (See United States v. Will (1980), 449 U.S. 200, 66 L. Ed. 2d 392, 101 S. Ct. 471.) Because we find the contention to be without merit, we perceive no need to discuss the rule of necessity.

CONCLUSION

Cronson's due process contention is untenable. He has not made any other argument. His Petition for Certiorari should be denied.

Respectfully submitted,

JOHN F. McCARTHY
Counsel of Record
ROBERT E. LEVIN
ROSEANN OLIVER
100 West Monroe Street
Chicago, Illinois 60603
(312) 263-1155

Attorneys for said Respondents

Of Counsel:
McCARTHY AND LEVIN

No. 89-850

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROBERT G. CRONSON, AUDITOR GENERAL OF THE STATE OF ILLINOIS,

Petitioner,

vs.

CHICAGO BAR ASSOCIATION and CERTAIN INDIVIDUAL MEMBERS THEREOF, DAVID C. HILLIARD, THOMAS Z. HAYWARD, JR., JOHN D. HAYES, CYNTHIA CHASE, ROBERT L. PATTULLO, JR.; ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS; and STATE BOARD OF LAW EXAMINERS OF THE SUPREME COURT OF ILLINOIS,

Respondents.

On Petition For Writ Of Certiorari To The Illinois Supreme Court

CONSOLIDATED REPLY OF PETITIONER ROBERT G. CRONSON TO RESPONDENTS' BRIEFS IN OPPOSITION

Of Counsel:

E. BARRETT PRETTYMAN, JR.
HOGAN & HARTSON
Columbia Square
Suite 1300 West
555 13th Street, N.W.
Washington, D.C. 20004
(202) 637-5600

LeGRAND L. MALANY
200 South Rosehill
Springfield, Illinois 62704
(217) 525-1152

SAMUEL W. WITWER, SR.
SAMUEL W. WITWER, JR.
Counsel of Record
WITWER, BURLAGE, POLTROCK & GIAMPIETRO
125 South Wacker Drive
Suite 2700
Chicago, Illinois 60606
(312) 332-6000

Attorneys for Petitioner

Special Assistant Attorneys General of the State of Illinois

Law Printing Co., Chicago 60611, (312) 321-0220

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

No. 89-850

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROBERT G. CRONSON, AUDITOR GENERAL OF THE STATE OF ILLINOIS,

Petitioner,

vs.

CHICAGO BAR ASSOCIATION and CERTAIN INDIVIDUAL MEMBERS THEREOF, DAVID C. HILLIARD, THOMAS Z. HAYWARD, JR., JOHN D. HAYES, CYNTHIA CHASE, ROBERT L. PATTULLO, JR.; ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS; and STATE BOARD OF LAW EXAMINERS OF THE SUPREME COURT OF ILLINOIS,

Respondents.

On Petition For Writ Of Certiorari To The Illinois Supreme Court

CONSOLIDATED REPLY OF PETITIONER ROBERT G. CRONSON TO RESPONDENTS' BRIEFS IN OPPOSITION

REPLY OF PETITIONER CRONSON

Respondents do not dispute the facts set forth in the Petition, namely, that the Illinois Supreme Court (a) did not wish to submit a portion of its finances to public audit; (b) instructed its agencies, ARDC and BLE, to resist such audits; (c) repeatedly announced prejudgments of the controlling legal issues; (d) litigated against Auditor General Cronson in lower courts through its agencies and advocates; and, finally, (e) assumed jurisdiction over its own case and ruled in its own favor. Neither do respondents contend that the federal issues were not timely raised and preserved at each appropriate stage of these proceedings. Rather, respondents largely rely upon arguments that Cronson is a "state officer", not a "person", and, hence, may not invoke the protection of the Due Process Clause of the Fourteenth Amendment. Respondents also contend that the Illinois court's conduct did not rise to the level of a due process infraction and, in any event, was necessitated by the fact that the recusal and substitution of judges sought by Cronson was "constitutionally prohibited." See, *e.g.*, BLE Br. at 1-3.

A. Cronson Has Standing As A Person Entitled To Invoke Fourteenth Amendment Due Process Protection.

Respondents' arguments on standing rest upon the following misinterpretations of Cronson's position, both as a *defendant* in the case below and as petitioner herein.

1. Cronson was sued individually and as a "person" in the Circuit Court case, as shown by the initial pleadings therein.[1] Accordingly, the assumption that he was sued

[1] The instant case against Cronson was commenced in the Circuit Court of Cook County on July 26, 1982. He was named in the summons and the original complaint filed on that date solely as an

(Footnote continued on following page)

as an official only is without foundation. Equally erroneous is any suggestion that Cronson has held himself out as the sovereign in this case. In no pleading has he purported to speak as the State of Illinois or as its relator.

2. Cronson has a direct personal stake in this case. He is a tenured official under the Illinois Constitution and Illinois State Auditing Act, subject to removal "for cause" and sworn to "faithfully discharge the duties of the office." Ill.Rev.Stat., 1987, Ch. 15, Sec. 302-6. Cronson's interest in upholding this responsibility and in carrying out his assigned duty to defend the audit process is therefore a personal as well as an official one. *Cf. Board of Education v. Allen*, 392 U.S. 236, 241 (1968).

3. Cronson introduced evidence at trial that he himself is a registered non-practicing attorney paying the same court-mandated license fees, whose proper administration and stewardship he seeks to uphold. Def. Ex. Tab 42 filed May 6, 1986. These fees are hardly *de minimis*. The court's published schedule currently requires an annual fee payment of $140. Ill.S.Ct.Rule 756(a)(1). During the period of this litigation alone, Cronson has thus been required to pay into the court's fund an aggregate of over $1,000. This is a more concrete property stake, one more closely linked to the subject matter of the dispute, than the taxpayer's interest which was deemed sufficient to confer standing in *Flast v. Cohen*, 392 U.S. 83, 106 (1968).[2]

---

[1] *continued*
individual defendant without any suggestion that he was being sued in an official capacity. When ARDC and BLE filed their joint amended complaint on July 15, 1984 pursuant to the realignment order, Cronson was named as an individual, followed by the words "Auditor General of the State of Illinois". Again, in no sense was he named in the amended complaint "as Auditor General" or in any official position.

[2] It is noteworthy, as pointed out by CBA (Br. at ii), that the five individual attorneys (the CBA members named in the cap-

-(Footnote continued on following page)

4. As pointed out in his Petition (at 11, n. 10 regarding *jus tertii* standing), Cronson has acted not only for himself, but for the citizens of the State, whose property rights include audit safeguards to insure that public funds are properly administered in an open atmosphere of public accountability. See, *e.g.*, Ill.Rev.Stat., Ch. 15, Secs. 301-2(b); 303-12. Thus, this case cannot be dismissed as a mere abstract or intramural dispute as respondents seek to portray it. Rather, at the heart of this case are property interests which are quite real and very substantial in magnitude.[3]

Respondents insist that Cronson can have no standing to litigate in a representative capacity because the funds in question must now, as a result of the Illinois Supreme Court's decision, be conclusively deemed "non-public"; *ergo*, Illinois citizens have no such protectable interests for Cronson to assert. ARDC Br. at 14. This, of course, begs the question, for it was this very interpretation

---

[2] *continued*

tion herein) joined the CBA in its complaint against Cronson, thereby asserting that *their* personal property interests would be affected by the outcome of the dispute over audit of the court's fund.

[3] Failure to afford Cronson an effective means before an impartial Illinois tribunal to seek correction of the audit decision below can have major repercussions for the preservation of sound financial practices in Illinois. The position of the Illinois Supreme Court, which it sustained by its own order denying Cronson review, is that only funds raised through taxation and appropriated by the Legislature are "public". Under such an interpretation, upwards of $4.3 billion of state receipts from licenses, fees, penalties and the like, heretofore undisputed as to their public nature and regularly audited, may escape future annual audits. Annual Report (1984) of Roland W. Burris, Comptroller of Illinois; Def. Ex. Tab No. 45. Further, CBA (at 2) seeks to reassure this Court that no serious property issue is present because the Illinois court has arranged its own private audits of itself and has offered copies of audit reports to Cronson. If public audits are constitutionally required, however, it is obvious that such self-help by the auditee is no proper substitute for the public auditor's function.

which was reached through a flawed decisional process by a court which was itself a partisan in the dispute. To now contend that the court's decision to uphold its own view of "public funds" operates to deprive Cronson of any standing to ask for procedural due process is ironic in the extreme.

Cronson, by virtue of his office and his statutory litigation authority, is situated in a position of direct relationship to other citizens of Illinois whose property rights are being affected. Further, as seen at note 3 herein, the underlying litigation has a significant impact on third-party interests. Under these circumstances, *jus tertii* standing is appropriate. *Cf. Caplin & Drysdale v. United States*, 491 U.S. ____, 105 L.Ed.2d 528, 540 n. 3 (1989).

5. Finally, respondents ignore the fact that Cronson was not a *plaintiff* in the underlying case and, hence, in invoking Fourteenth Amendment due process protection, his rights and standing are to be measured by the fact that he was selected and sued *as a defendant*. It was the Illinois Supreme Court, acting through its two controlled agencies, ARDC and BLE, and the CBA as its avowed surrogate, that in 1982 selected Cronson as a party and prosecuted the case below against him as defendant.

In declaring Cronson a "non-person" under the Fourteenth Amendment, powerless to complain of procedural due process deprivations, ARDC places heavy reliance on this Court's recent decision in *Will v. Michigan Department of State Police*, 491 U.S. ____, 105 L.Ed.2d 45 (1989). There, the Court held that a State and state officials, sued as such, are not "persons" capable of responding to liability claims under 42 U.S.C., § 1983. However, this ruling does not relate to those "persons" protected by the Fourteenth Amendment. The instant case is not a Section 1983 or other civil rights action whereby Cronson seeks damages or other affirmative relief. But even more fundamen-

tally, the word "person" in the Fourteenth Amendment relates not to the target of liability, as in Section 1983, but rather, to the *object* of the Amendment's protection. There, it is the "State" whose misconduct is proscribed: "* * * nor shall any State deprive any person of life, liberty, or property without due process law." The word "person" as used in the Fourteenth Amendment is the individual or entity aggrieved and deserving of protection when the Amendment is violated.

Perhaps for these reasons, this Court has never, to date, held that state officers are unable to qualify as "persons" entitled to the basic protections afforded by the Fourteenth Amendment. ARDC itself has admitted the absence of any such direct authority. Br. at 11. Yet, it urges an interpretation which is tantamount to saying that procedural due process becomes optional in any suit where, as here, the defendant happens to occupy a state office. This cannot be the law.

The other "person" and standing cases cited by respondents are likewise inapposite. In *Baxley v. Rutland*, 409 F.Supp. 1249 (M.D. Ala. 1976) the Alabama Attorney General sought to bring a suit, as purported relator for his State, seeking to attack certain of that State's own legislative enactments. The court denied standing, noting the incongruity of asserting such a conflicting role in behalf of a state. *Id.* at 1253. The court also implied that standing *would* be upheld in the more traditional situation where the officer was sued to defend a particular enactment or position. *Id.* at 1254.

Nor is *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) controlling here. *Katzenbach* involved an effort to test the conformity of the Voting Rights Act of 1965 to the requirements of the Fifth Amendment. The Court ruled that South Carolina, suing in its own capacity as a sovereign, was not a "person" within the meaning of

the Fifth Amendment's Due Process Clause. But Cronson, of course, neither acted as a plaintiff below nor did he profess to litigate as the sovereign State of Illinois.

Whether the case below be viewed as a "personal-capacity" suit or as an "official-capacity" suit against Cronson "as Auditor General of the State of Illinois", he has standing to protest when, once having been sued, he is involuntarily exposed to a procedure devoid of fundamental fairness:

> Submission to a fatally biased decision-making process is in itself a constitutional injury sufficient to warrant injunctive relief * * * [*United Church of the Medical Center v. Medical Center Comm'n*, 689 F.2d 693, 701 (7th Cir. 1982).]

Also impacted from the outset of the Illinois court's self-inspired litigation below were Cronson's *liberty* interests. After having been brought into the case by agents and representatives of the court, Cronson was effectively deprived of a fair opportunity to litigate the important audit issues, particularly at the final and most crucial appellate stage of the State's adjudicatory process.[4] As a result, Cronson's freedom to carry out his prescribed duties was curtailed and the range of his permitted actions was narrowed.

Fair access to the full range of traditional procedures (even discretionary ones), in and of itself, constitutes a

---

[4] CBA asserts that Cronson has no cause to complain because he had his day in two lower courts before coming before the Illinois Supreme Court. Br. at 3. The fact that Cronson had an opportunity to litigate in the trial court and the intermediate Illinois Appellate Court, which may not have been under any direct due process disability, does not diminish his right of access to a fair state court of last resort when the State's judicial enactments confirm such a right to apply for an appeal as they do in Illinois. *Evitts v. Lucey*, 469 U.S. 387 (1985). Because due process rights extend to the full range of judicial mechanisms, such rights cannot be truncated or retarded in the appellate process. *Rheuark v. Shaw*, 628 F.2d 297, 302 (5th Cir. 1980), *cert. denied*, 450 U.S. 931 (1981).

"liberty" interest which inheres in Cronson as well as to other citizens called to court as defendants. His effective exclusion from the opportunity fairly to advance his defense in a judicially impartial environment is no different in principle than the "access-to-court" dilemma facing the excluded divorce litigants in *Boddie v. Connecticut*, 401 U.S. 371 (1971). Here, Cronson's entitlement to an unbiased proceeding before an independent and disinterested judiciary, was denied just as certainly as if the courthouse door had been barred to him. In *Boddie*, this Court held that a state's filing fee restrictions regarding divorce litigants obstructed their access to the judicial process and, thus, immediately and concurrently impaired their fundamental liberty:

> * * * [A]t that point [when a defendant is sued] the judicial proceeding becomes the only effective means of resolving the dispute at hand and denial of a defendant's full access to that process raises grave problems for its legitimacy. [*Id.* at 376.] (Brackets supplied.)

This Court further added:

> [D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.
>
> * * *
>
> . . . an individual [must] be given an opportunity for a hearing *before* he is deprived of a significant property interest . . . [*Id.* at 377, 379 (emphasis in original).]

B. The Due Process Violations Have Been Numerous And There Was No Case Of Necessity.

BLE (at 5) and CBA (at 3) suggest that petitioner's sole ground for making out a due process violation is the failure of the court below to recuse four justices, constituting a controlling majority, and to appoint successors, *pro hac*

vice, form an Illinois court to review the Petition for Leave to Appeal from the Appellate Court decision. But the refusal of certain members of the court below to step aside in favor of an impartial tribunal or even to address the federal due process issue cannot be viewed in isolation. As set forth in the Petition, due process violations by acts of bias, prejudgment, and control of litigation through the state Supreme Court's agencies have been numerous and continuous since 1977. Underlying all of these acts was the court's intense concern with control and oversight of its institutional funds—an interest which is conceptually no different than the disqualifying roles disapproved by this Court in both *Tumey v. Ohio*, 273 U.S. 510, 532-533 (1927) (direct pecuniary interest of mayor not "only reason" for denial of due process; interest in financial condition of Village a factor as well), and in *Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

Respondents repeatedly assert that the Illinois courts' procedures did not rise to the level of due process violations, but they fail to articulate why this is so. In the same manner, respondents dismiss Cronson's contentions about the Rule of Necessity with conclusionary statements that the court had no choice but to take the case and deal adversely with Cronson. They assert that "no provision is made for substitution [of judges under Illinois law] * * *", ARDC Br. at 22, or, even more pointedly, that "* * * the substitutions sought by petitioner were constitutionally *prohibited*." BLE Br. at 13; emphasis added. Nowhere, however, do they attempt to address the language of the recusal/temporary service provisions invoked by Cronson or to explain why the position taken by the court below is even colorably correct.[5]

[5] Contrary to respondents' contentions, this is surely not a necessity case comparable to *United States v. Will*, 449 U.S. 200 (1980), or a case where

(Footnote continued on following page)

ARDC's brief seriously misstates *Perlman v. First National Bank of Chicago*, 60 Ill.2d 529, 331 N.E.2d 65 (1975), in relation to the due process issues of recusal and temporary appointment of four justices *pro hac vice*. That case does not hold that the Illinois constitutional "authority to assign justices does not extend to the Supreme Court of Illinois when there is a full complement of sitting justices." ARDC Br. at 24. Further, it does not support respondents' statement that "the petitioner's request that substitute justices be appointed is inconsistent with the decisions of the Illinois Supreme Court." ARDC Br. at 25. Nor does it constitute an authority for the proposition that "[w]here recusal has occurred and the constitutional requirement for concurrences is an impossibility, the Appellate Court decision becomes the conclusive adjudication * * *. Br. at 25. The clear meaning of *Perlman* is that four Illinois justices refused to exercise their constitutional authority to appoint two temporary substitute justices, *pro hac vice*.

The fact is that under existing Illinois constitutional provisions, the door was open for the court freely to recuse

---

[5] *continued*

> * * * accepting [appellant's] expansive contentions might require the disqualification of every judge in the State. [BLE Br. at 14, quoting from *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986).]

Here, Cronson is challenging only the participation of four of Illinois' several hundred judges. The remainder have not been enmeshed in the audit controversy. Even more dubious is the suggestion that under Cronson's bias formulation, *no* state Supreme Court, no matter how constituted, could deal with the audit case concerning the court's finances. BLE Br. at 15-16. The simple answer to this is that even if the solution sought by Cronson is less than perfect, the four recusals would have greatly improved the chances for fairness and diminished the due process infirmity. After having made clear his willingness to abide by a decision of a supreme court reconstituted in that manner, Cronson would obviously be obliged to stand by that commitment.

and reassign judges for this single cause, without any violence to its quorum, its numerical complement, or its operating authority. Such an exercise of discretion would not only have served the salutary purpose of preserving federal due process rights; it would also have been unassailable as a final decision of a state supreme court relative to its own procedures. Here, however, the court reached hard for a contrary interpretation and would not even comment on the due process implications of its action. This is truly a case of a court needlessly creating its own "necessity" in order to prevail in litigation and to escape due process accountability.

Respectfully submitted,

Of Counsel:

E. BARRETT PRETTYMAN, JR.
HOGAN & HARTSON
Columbia Square
Suite 1300 West
555 13th Street, N.W.
Washington, D.C. 20004
(202) 637-5600

LEGRAND L. MALANY
600 South Rosehill
Springfield, Illinois 62704
(217) 525-1132

SAMUEL W. WITWER, SR.
SAMUEL W. WITWER, JR.
Counsel of Record
WITWER, BURLAGE, POLTROCK & GIAMPIETRO
125 South Wacker Drive
Suite 2700
Chicago, Illinois 60606
(312) 332-6000

Attorneys for Petitioner

Special Assistant Attorneys General
of the State of Illinois